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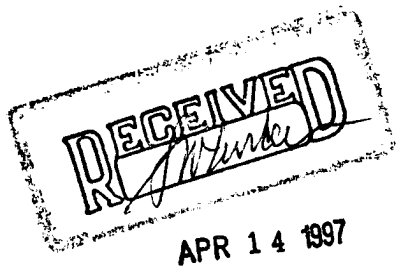

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In re:	Docket No. EPCRA-09-94-0015
CATALINA YACHTS, INC.,	**POST HEARING BRIEF**
Respondent.	

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND BRIEF

I. INTRODUCTION.

This proceeding concerns a civil administrative enforcement action for penalties brought under the authority of Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. §§ 11001 et seq. (also known as the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA")) and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22. The action was initiated by the Director, Air and Toxics Division, United States Environmental Protection Agency, Region 9 ("EPA"), through a

Complaint and Notice of Opportunity for Hearing ("Complaint") filed with the Regional Hearing Clerk, Region 9 on June 20, 1994, against Catalina Yachts, Inc. ("Respondent") whose place of business is located at 21200 Victory Boulevard, Woodland Hills, CA 91364 (hereinafter "Facility").

In the Complaint, Complainant, EPA, charged Respondent with the violation of EPCRA in seven separate counts. Counts I and II charge Respondent with failure to submit toxic release inventory forms, ("Form Rs") covering the usage of acetone for the years 1988 and 1989 in violation of Section 313 of EPCRA [42 U.S.C. § 11023] and 40 C.F.R. Part 372. Counts III through VII charge Respondent with failure to submit Form Rs covering usage of styrene for the years 1988, 1989, 1990, 1991 and 1992, also in violation of Section 313 of EPCRA and 40 C.F.R. Part 372.

Respondent's Answer To Civil Complaint ("Answer") was filed with the Regional Hearing Clerk, Region 9, on July 14, 1994. In the introductory paragraph of the Answer, Respondent admitted that it is a "person", an "owner or operator" of the Facility, the SIC for the Facility is 3732 and that there are ten or more "full-time employees" at the Facility. The introductory paragraph concludes with a general denial which reads as follows:

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> Respondent is continuing to review its records and is at the present time unable to respond to the remaining allegations in . . . the Complaint and, therefore, denies each and every remaining allegation. Respondent reserves the right to amend its Answer when it completes its review.

Respondent's response to each of the seven counts which follows, is a denial based on the review of its records. There is no indication that Respondent has ever completed "its review" of the records.

On October 4, 1994, EPA filed a Motion for Accelerated Decision as to liability based on EPA's contention that there were no material issues of fact to be decided at a hearing. In due course Respondent filed their opposition to Complainant's motion requesting the Trier of Fact to either dismiss the action, determine liability with no civil penalty or set a hearing to determine an appropriate civil penalty.

By his order dated January 10, 1995, the Presiding Administrative Law Judge granted Complainant's motion for accelerated decision as to liability and set the stage for a hearing on whether a civil penalty is to be assessed and if so, the amount. The hearing on the issue of a civil penalty was held on January 28, 1997, pursuant to the order of the Presiding Administrative Law Judge dated September 4, 1996. Respondent was represented at the hearing by Attorneys James L. Meeder and

Eileen M. Nottoli of Beveridge and Diamond. Complainant was represented by David M. Jones, Assistant Regional Counsel, EPA.

II. PROPOSED FINDINGS OF FACT.

1. The Complainant by delegation from the Administrator of the United States Environmental Protection Agency and the Regional Administrator, EPA, is the Director of the Air and Toxics Division, EPA. Complaint ¶1. Regional Order No. 1260.14 dated January 14, 1997, redelegated the authority to bring this action to the Director, Cross-Media Division.

2. The Respondent is Catalina Yachts, Inc. a boat building company. Complaint ¶1; Transcript at 4, line 23, Transcript at 79 and 80.

3. The Respondent is a person as defined by Section 329(7) of EPCRA. Complaint ¶5.

4. The Respondent is an owner or operator of a facility as defined by Section 329(4) OF EPCRA which is located at 21200 Victory Boulevard, Woodland Hills, CA 91364. Complaint ¶7; Transcript at 5, line 11.

5. The Facility employs ten or more full-time employees as defined by 40 C.F.R. § 372.3. Complaint ¶8; Transcript at 5, lines 13 and 14, at 80, lines 12 to 15, at 81, lines 5 to 7; Exhibit A, p.5 ¶10, Exhibit A,p.6 ¶10 and Ex 4.

6. The Facility is classified in Standard Industrial Classification 3732. Complaint ¶9; Transcript at 5, lines 12 and 13; Exhibit A,p. 5 ¶10, Exhibit A,p. 6 ¶10 and Ex 4.

7. An authorized EPA representative inspected the Facility on November 15, 1993. Complaint ¶6; Transcript at 81, line 8; Exhibit A,p. 3 ¶6.

8. The November 15, 1993, inspection of the Facility revealed that in calendar years 1988 and 1989, Respondent "otherwise used" acetone CAS No. 67-64-1 in excess of 10,000 pounds. Complaint ¶13 and ¶18.

9. Acetone is a toxic chemical listed under 40 C.F.R. § 372.65. Complaint ¶13 and ¶18.

10. Respondent failed to submit a Form R for calendar years 1988 and 1989, respectively, for acetone to the Administrator, U.S. Environmental Protection Agency and the State of California by July 1 of 1989 and 1990, respectively. Complaint ¶14 and ¶19; Exhibit A,p.4 ¶8.

11. The November 15, 1993, inspection of the Facility revealed that in calendar year 1988 Respondent processed styrene, CAS No. 100-42-5, in excess of 50,000 pounds. Complaint ¶23.

12. The November 15, 1993, inspection of the Facility revealed

that in calendar years 1989, 1990, 1991 and 1992, Respondent processed styrene, CAS No. 100-42-5 in excess of 25,000 pounds. Complaint ¶28, ¶33, ¶38 and ¶43.

13. Styrene is a toxic chemical listed under 40 C.F.R. § 372.65. Complaint ¶23, ¶28, ¶33, ¶38 and ¶43.

14. Respondent failed to submit a Form R for calendar years 1988, 1989, 1990, 1991 and 1992, respectively, for styrene to the Administrator, U.S. Environmental Protection Agency and the State of California by July 1 of 1989, 1990, 1991, 1992 and 1993, respectively. Complaint ¶24, ¶29, ¶34, ¶39 and ¶44; Exhibit A,p.4 ¶8.

15. The Order Granting Motion For Accelerated Decision As To Liability dated January 10, 1995, established that Respondent violated EPCRA as alleged in the Complaint and that the only issue remaining for hearing is the amount of the civil penalty to be assessed. Transcript at 6, lines 6 to 19; Exhibit A 6 ¶11.

16. Respondent had annual sales of approximately $40 million at the time that the Complaint was filed. Exhibit A,p.6 ¶10 and Exhibit 4.

17. Respondent had more than fifty employees at the time that the Complaint was filed. Complaint ¶11; Exhibit A,p.6 ¶10 and Exhibit 4.

18. The proposed civil penalty set forth in the Complaint was calculated in accordance with the August 10, 1992, Enforcement Response Policy for Section 313 and Section 6607 of the Pollution Prevention Act (1990)(hereinafter "ERP") Complaint ¶9; Exhibit A, p.4 ¶9 and Exhibit 3.

19. In calculation of the civil penalty in this action, EPA took into account:

a) the nature,

b) circumstances,

c) extent, and

d) gravity of the violation(s);

and, with respect to the violator,

a) annual gross sales,

b) number of employees, and

c) quantity of chemicals processed (styrenne) or otherwise used (acetone). Complaint ¶9; Transcript at 13 and 14, Transcript at 16, lines 1 to 9, Exhibit R-2, at 29, lines 19 to 25, Transcript at 30, lines 1 to 25, Transcript at 31, lines 1 to 7, Transcript at 32, lines 16 to 25, Transcript at 33, lines 4 to 15, Transcript at 34, lines 9 to 20, Transcript at 35, lines 11 to 25, Transcript at 36, lines 1 to 24, Transcript at 37, lines 1 to 25, Transcript at 38, lines 1 to 25, Transcript at 39, lines 1

to 8; Exhibit A,p.4 ¶9 and Exhibit 3, Exhibit A,p.4 ¶10, Exhibit A,p.5 ¶8.

20. The purpose of the ERP is to ensure that the U.S. Environmental Protection Agency takes appropriate enforcement actions in a fair and consistent manner as well as to ensure that the enforcement response is appropriate for the violation. Transcript at 16, lines 14 and 15, Exhibit R-2 p.1.

21. In calendar years 1988 and 1989, Respondent used more than ten times the 10,000 pound threshold for otherwise use of acetone. Complaint ¶13 and ¶18.

22. Respondent submitted the Form Rs to EPA for calendar years 1988 and 1989, for acetone in May, 1994, more than one year after July 1, 1989 and July 1, 1990, respectively. Exhibit A,p.7 ¶14.

23. In calendar year 1988, Respondent processed more than ten times the 50,000 pound threshold for styrene. Complaint ¶23.

24. In calendar year 1989, 1990, 1991 and 1992, respectively, Respondent processed more than ten times the 25,000 pound threshold for styrene. Complaint ¶28, ¶33, ¶38 and ¶43.

25. Respondent submitted the Form R to EPA for calendar year 1988, for styrene in May, 1994, more than one year after the due date of July 1, 1989. Transcript at 39, lines 20 and 21; Exhibit A,p.7 ¶14.

26. Respondent submitted the Form R to EPA for calendar year 1989, for styrene in May, 1994, more than one year after the due date of July 1, 1990. Transcript at 39, lines 20 and 21; Exhibit A,p.7 ¶14.

27. Respondent submitted the Form R to EPA for calendar year 1990, for styrene in May, 1994, more than one year after the due date of July 1, 1991. Transcript at 39, lines 20 and 21; Exhibit A,p.7 ¶14.

28. Respondent submitted the Form R to EPA for calendar year 1991, for styrene in May, 1994, more than one year after the due date of July 1, 1992. Transcript at 39, lines 20 and 21; Exhibit A,p.7 ¶14.

29. Respondent submitted the Form R to EPA for calendar year 1992, for styrene more than eleven months after the due date of July 1, 1993. Transcript at 39, lines 20 and 21; Exhibit A,p.7 ¶14.

30. Respondent is currently in compliance with Section 313 of EPCRA. Exhibit A,p.7 ¶14.

31. Respondent submitted the delinquent Form Rs for acetone and styrene to the State of California. Exhibit A,p.7 ¶14.

32. Respondent does not have a history of past violations of Section 313 of EPCRA. Exhibit A,p.5 ¶8; Transcript at 32, lines

21 to 25, Transcript at 97, lines 10 to 17.

33. Region 9 has conducted outreach workshops under Section 313 of EPCRA. Notice of the workshops is mailed to companies that may be required to report under EPCRA. Based on the databases maintained by EPA, Respondent was on the mailing list for these mailings at least in 1987 and 1993. Exhibit A,p.9 ¶17.

34. Information contained in the toxic chemical release inventory is used by both EPA and local communities for purposes of emergency planning and pollution prevention planning. Exhibit A,p.8 ¶16.

35. Acetone was delisted effective June 16, 1995. Exhibit A,p.9 ¶19; Transcript at 34, lines 6 to 8.

36. Other penalty adjustment factors in the ERP that were considered by Complainant but found inapplicable to the calculation of the proposed civil penalty in the Complaint were voluntary disclosure, Respondent's attitude, inability to pay and other factors as justice may require. Exhibit A,p.5 ¶8; Transcript at 34, line 14 to 20, Transcript at 36, lines 19 to 24, Transcript at 38, lines 2 to 39.

37. A hearing was held on January 28, 1997, in San Francisco, CA before the Honorable Spencer T. Nissen, Chief Administrative Law Judge (Acting).

38. At the hearing Respondent presented five past projects which included:

1) Conversion from the use of acetone to MBE as a solvent at the Facility,[1]

2) Termination of the anti-fouling bottom paint service,[2]

3) Conversion from sprayed gel-coat to brushable gel-coat,[3]

4) Shift from spirit to water-based contact cement[4] and

5) Plant tours and an open house to reduce public fears.[5]

III. PROPOSED CONCLUSIONS OF LAW.

1. Respondent's failure to submit a Form R for acetone for 1988 by July 1, 1989, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

2. Respondent's failure to submit a Form R for 1989 for acetone by July 1, 1990, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

3. Respondent's failure to submit a Form R for 1988 for Styrene by July 1, 1989, is a violation of Section 313 of EPCRA [42

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[1] Transcript at 104, line 19.

[2] Transcript at 113, line 12.

[3] Transcript at 114, line 23.

[4] Transcript at 117, line 4.

[5] Transcript at 99, line 21.

U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

4. Respondent's failure to submit a Form R for 1989 for Styrene by July 1, 1990, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

5. Respondent's failure to submit a Form R for 1990 for Styrene by July 1, 1991, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

6. Respondent's failure to submit a Form R for 1991 for Styrene by July 1, 1992, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

7. Respondent's failure to submit a Form R for 1992 for Styrene by July 1, 1993, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

8. Evidence of past projects presented by Respondent at the hearing fails to meet the guidance presented by Environmental Appeals Board in *In re: Spang & Company*(1995), EPCRA Appeal Nos. 94-3 & 94-4. The past projects also do not qualify as supplemental environmental projects. No credit will be allowed against the civil penalty to be assessed against Respondent.

9. A penalty of one hundred sixty-two thousand five hundred dollars, the proposed penalty set forth in the Complaint after allowance for the delisting of acetone, is appropriate for the

violations of EPCRA alleged in the Complaint, based upon the nature, extent and circumstances of the violations.

IV. THE PROPOSED PENALTY IS CONSISTENT WITH THE INTENT AND PURPOSE OF EPCRA.

a. The Purpose of EPCRA is to Keep Communities Informed About Toxic Chemical Releases.

The purpose of Section 313 of EPCRA reporting is to gather information on the releases of certain chemicals to the environment and to make that information available to the public. *In re: Riverside Furniture Corp.* (1989)[6], Docket No. EPCRA-88-H-VI-406S, p.10; 40 C.F.R. § 372.1. The chemical release information collected through the Form Rs is compiled and entered into a centralized database. The integrity and value of the Toxic Chemical Release Inventory is entirely dependent on accurate and timely reports submitted by the regulated community. Riverside Furniture, at 10 - 11. "[T]he filing of such reports was intended, in this as in other programs, to be timely, complete and accurate. The success of EPCRA can be attained only

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[6] At the time that *Riverside Furniture* was filed and decided the Enforcement Response Policy For Section 313 of the Emergency Planning and Community Right to Know Act also known as Title III of the Superfund Amendments and Reauthorization Act (SARA) dated December 2, 1988, was in place. *Riverside*, p.4.n.1.

through voluntary, strict and comprehensive compliance with the Act and regulations which recognize that achievement of such compliance would be difficult and that a lack of compliance would weaken, if not defeat, the purposes expressed." *Riverside Furniture*, at 10.

Over 300[7] chemicals and chemical compounds were subject to reporting at the time the Complaint was filed. These are among the most common chemical substances used in industry. Many of the chemicals are acutely toxic, others are chronic toxins or carcinogens. All of the chemicals on the list have some associated adverse health or environmental effect. Some are specifically implicated in causing depletion of the earth's ozone layer.

The Toxic Chemical Release Inventory is the only source of information pertaining to the chemicals reported which has been specifically mandated by the Congress to be directly accessible to the public. The information resides in a publicly accessible on-line computerized database and is made available to the public through annual press releases by EPA, national reports and

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[7] At the time that Respondent's Form Rs that are the subject of the Complaint were due, 40 C.F.R. § 372.65 required reporting on over 300 chemicals and chemical categories. The list was expanded in 1994.

reports provided by EPA to the states and communities throughout the nation. Data from the Inventory is also available in many cities in their public libraries.[8]

The Toxic Chemical Release Inventory is used by EPA and local communities for emergency planning and pollution prevention planning. EPA uses this information to guide the direction of environmental programs and to regulate the amount of toxic chemicals that may be released to the environment. Other programs such as the Pollution Prevention Initiative and the Waste Minimization Project, use the Inventory to highlight priority industries where toxic and carcinogenic chemicals are being released and to identify individual facilities within a given industry that have particularly high or particularly low releases of specific chemicals.

The regulatory scheme of EPCRA reflects Congressional concern that accurate information on both accidental and non-accidental releases of toxic chemicals should be available to the community, to states and to the Federal government. Although the concern about the hazardous chemicals used by neighborhood companies was heightened by the 1984 chemical tragedy in Bhopal,

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[8] Transcript at 42, lines 11 to 25, Transcript at 43, lines 1 to 11.

India, where a release of toxic gas killed and injured thousands of people, Congress was concerned as well about the insidious effects of routine releases of toxic chemicals that are not immediately life-threatening. In an effort to address these concerns, Congress passed EPCRA in 1986 to help communities within the United States to deal safely and effectively with the many hazardous substances that are used throughout our society.

In discussing the concept of such a reporting requirement during a Senate debate on an early version of the provision, Senator Robert T. Stafford of Vermont stated:

> The intent behind this amendment is to require manufacturing facilities handling substantial quantities of toxic chemicals to report the annual quantities of these chemicals they dump into the environment. These reports when compiled will constitute an inventory which tells us where the toxic chemicals are and where they are being released into the environment. Such an inventory will be a valuable tool for environmental regulators, for the health professionals, the concerned public and the companies themselves.
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> ****
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> After the Bhopal disaster and the continuing litany of chemical accidents in this country, the public wants to know and the public has a right to know about the releases of toxic chemicals, deliberate releases that occur every day as well as accidental releases. This amendment, Mr. President, will provide that information. 131 Cong.Rec. S11772 (daily ed. Sept. 19, 1985) (Statement of Sen. Stafford).

During that Senate debate, Senator Frank R. Lautenberg of New Jersey addressed the way in which the information collected

by such report would be used:

> This inventory is to be used by State and Federal agencies to improve toxic chemical management by monitoring use and tracking releases of these substances. An effective inventory will help us better understand the flow of toxic into the environment and thereby aid in the preventing future Superfund sites. It will also provide critical information to Federal and State air, water and hazardous waste programs to track compliance and enforcement efforts within these programs . . . .[S]uch information can help inform and direct research efforts. Finally, Mr. President, the inventory will provide the Government and the public with information about daily and routine exposure to toxic in our environment--something essential to protecting the public health. 131 Cong.Rec. S11776 (daily ed. Sept. 19, 1985) (Statement of Sen. Lautenberg).

Likewise, during the House debate over an early version of the reporting requirements, Representative Gerry Sikorski of Minnesota recognized the need for such information, stating:

> We know that the vast majority of dangerous exposure to hazardous chemicals is through long-term, routine or regular releases, not the dramatic Bhopal kind of incidents. The effect of exposure to these chemicals is not discernible overnight . . . .
>
> ****
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> The millions of Americans in thousands of neighborhoods, your neighborhoods, exposed to toxic chemicals, your constituents and your neighborhoods have a fundamental right to know about the hazardous chemicals, acute and chronic, that are released into the environment hour after hour, day after day, year after year. They have a right to know where the strange odors are coming from. They have a right to know what toxic chemicals are mixed in the soil their kids play on and they have a right to know what poisonous chemicals are contaminating their drinking water. 131 Cong. Reg. H11204-5 (daily ed. Dec. 6, 1985) (Statement of Rep.

Sikorski).

Respondent in this case should be assessed a substantial penalty because its failure to timely file Form Rs goes to the heart of the purpose of EPCRA--the community's right to know about releases of toxic chemicals.[9]

b. EPA Considered the Statutory Factors in Proposing the Civil Penalty.

1. Factors Related to the Violation.

The applicable statutory factors are found in Section 16 of

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[9] EPCRA 'is intended to encourage and support emergency planning efforts at the State and local level and provide residents and local governments with information concerning potential chemical hazards present in their communities.' *Emergency Planning and Community Right to Know Programs, Interim Final Rule,* 51 Fed.Reg. 41,570 (Nov. 17, 1986). Section 313 is contained in EPCRA Subtitle B, which 'provides the mechanism for community awareness with respect to hazardous chemicals present in the locality. This information is critical for effective local contingency planning.' *Id.* A facility's failure to comply with EPCRA's annual toxic chemical reporting requirement for *each* chemical subject to the requirement potentially leaves a gap in the information available to federal, state and local planning officials. The per-violation penalties contemplated by EPCRA § 325(c)(1) are the means preferred by Congress to deter information gaps and redress violations, and **the result may be substantial penalties for multiple violations**. (Footnote Omitted) [Emphasis Added]

In re: Pacific Refining Company(1994), EPCRA Appeal No. 94-1, pp.17-18.

the Toxic Substances Control Act (TSCA), as amended[10] [15 U.S.C. § 2615] which draws a distinct demarcation between factors relating to the violation itself and factors relating to the violator. For the violation itself, Section 16 of TSCA provides that in determining the amount of the civil penalty EPA must take into account the "nature, circumstances, extent and gravity of the violation or violations." [15 U.S.C. § 2615(a)(2)(B)]. The meaning of each of these terms will be explored in turn.

The commonly understood meaning of "nature" is the most appropriate interpretation. Webster's New World Dictionary defines nature as "[t]he essential character of a thing; quality or qualities that make something what it is; essence . . ." . As EPA noted in its 1980 TSCA penalty policy, "the nature (essential character) of a violation is best defined by the set of requirements violated." 45 Fed.Reg. 59770, 59771.

In this case, the nature of the EPCRA violations was the Respondent's failure to provide timely, complete and accurate

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[10] With respect to civil penalties under EPCRA, Section 325 of EPCRA [42 U.S.C. § 11045] provides in part:

> Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15. 42 U.S.C. § 11045(b)(2).

information to EPA and the State of California as required by Section 313 of EPCRA [42 U.S.C. § 11023].[11] Respondent filed each of the Form Rs required by the statute over one year after the date that the same were due and after the November, 1993, inspection during which the Facility's non-compliant status was uncovered.[12] Respondent's failure to provide the Form R information in a timely manner deprived the public of information on the use and releases of chemicals in the community and, consequently, deprives both individuals and government organizations of the opportunity to take steps to reduce the risks posed by these releases and thereby, could result in increased risk to the local community.

"Circumstances" is reasonably interpreted in the context of the TSCA penalty assessment factors as reflecting the probability of harm occurring as a result of the violation. See 45 Fed. Reg. 59770, 59772. Under Section 313 of EPCRA the circumstances of the violations "takes into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to the State of California and to

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[11] Transcript at 13, lines 8 to 25.

[12] Exhibit A 7 ¶15.

the Federal government." ERP, p.8. The circumstances of the violations in this case is the failure to report in a timely manner.[13] This is the most significant of the violations of Section 313. Failure to report is classified as the most serious violation of Section 313 of EPCRA because such failure deprives the public of information on chemical releases which may have a significant affect on public health and the environment. In the case at bar toxic release information for the year 1988, Counts I and III, was not made available to the public for approximately five years.

The natural meaning of the term "extent" suggests a consideration of the degree, range or scope of a violation. In the context of Section 313 of EPCRA, EPA interprets this "extent" to take into consideration the quantity of a listed toxic chemical a facility processes, manufactures or otherwise uses. Facilities that process, manufacture or otherwise use ten or more times the reporting threshold for the Section 313 chemicals create a greater potential of exposure to the employees at the facility, the public and the environment. The amount of toxic chemicals processed, manufactured or otherwise used should be

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[13] Transcript at 16, lines 1 to 9.

considered in assessing a penalty under EPCRA because the major goal and intent of EPCRA is to make available to the general public, on an annual basis, a reasonable estimate of the toxic chemicals emitted into their local communities from regulated sources.[14] ERP, p.9.

Another factor in determining the extent of the violation is size of the respondent's business. The size of the respondent's business reflects the proposition that a smaller penalty will have the same deterrent effect on a small company, as a large penalty on a larger company. Respondent has more than 50 employees and at the time the Complaint was filed had annual sales of approximately $40 million.

The common sense meaning of "gravity" in the context of penalty assessment is the overall seriousness of a violation. In both TSCA and the ERP, EPA interprets "gravity" as a composite of other factors. For violations of Section 313 of EPCRA it is reasonable to view gravity as incorporating the considerations under the extent and circumstances elements of the violations.[15]

2. Statutory Adjustment Factors That Relate To The Violator.

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[14] Transcript at 30, lines 13 to 22.

[15] Transcript at 31, lines 12 to 17.

In the paragraphs under the heading on page 16 above, consideration was given to factors related to the violation. Section 16 of TSCA also requires the consideration of factors pertaining to the violator. These factors include: "Ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other factors as justice may require." [15 U.S.C. § 2615(a)(2)(B)]

Ability to pay generally encompasses a review of a violator's solvency and an assessment of the effect a given penalty will have on the firm's ability to continue in business. However, in an order by the Presiding Administrative Law Judge[16] rescinding an order whereby Complainant sought financial information to determine Respondent's ability to pay, Respondent stated that it was not raising ability to pay as a defense to the proposed penalty.[17] The order then stated ". . . the only reasonable interpretation of Catalina's assertion is that it is a waiver of 'ability to pay/inability to pay' as a defense to the penalty sought by Complainant . . ." .[18] No evidence has been

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[16] Order Rescinding Discovery Order dated April 1, 1996.

[17] *Id.*p.4.

[18] *Id.*

presented to date by Respondent regarding Respondent's ability to pay the proposed civil penalty or that payment of the proposed civil penalty would in any way impair Respondent's ability to continue in the boat building business. Respondent does not have any history of prior violations of EPCRA.

EPCRA has been determined to be a strict liability statute; thus, culpability is considered only when there is evidence that Respondent knowingly violated EPCRA. *Riverside Furniture*, Interlocutory Order Granting Complainant's Motion For Partial Accelerated Decision, p.5,n.2. (Intent is not an element of an EPCRA civil violations); see also ERP, p.14 ("Lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA . . . ."). There is no evidence that Respondent's violations were knowing or willful. Although EPA considered the statutory factors of Respondent's ability to pay, effect on ability to continue to do business and culpability, in the case at bar, no adjustment was made based upon these factors because they were determined by EPA as inapplicable to Respondent.

The final factor in the category of statutory factors to be considered is "other factors as justice may require." It is the general practice at EPA to apply this factor during settlement

negotiations.[19] To assure national consistency the ERP has provided guidance in assessing issues which may qualify as "other factors as justice may require." The ERP factors include: new ownership for history of prior violations, borderline violations and lack of control over the violation. In the case at bar Respondent's violations are not due to a new ownership for history of prior violations. Nor are the violations borderline since Respondent used acetone and styrene at quantities well over ten times the reporting quantity threshold[20] and had over 200 employees at the time of the inspection,[21] versus 10 employees for the number of employees reporting threshold.[22] Nothing on

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[19] Transcript at 34, lines 14 to 20, and Transcript at 37, lines 5 to 18.

[20] The following is a summary of usage and threshold taken from the Complaint:

		Acetone Usage	Styrene Usage
1988	approx.	308,106 pounds	1,784,078 pounds*
1989	approx.	101,655 pounds	2,691,348 pounds**
1990	approx.		898,416 pounds
1991	approx.		624,441 pounds
1992	approx.		660,798 pounds
	Threshold	10,000 pounds	50,000 pounds*
			25,000 pounds**

[21] Transcript at 81, line 7.

[22] Section 313(a) [42 U.S.C. § 11023(a)].

the record in this action shows that Respondent had less than total control over the violations. The ERP warns that "[u]se of this reduction is expected to be rare and the circumstances justifying its use must be thoroughly documented in the case file."[23]

3. EPA Also Considered The Adjustment Factors In The ERP.

In addition to the statutory factors, in assessing a penalty EPA also considers it appropriate to weigh several additional adjustment factors under the ERP. These are: voluntary disclosure, delisted chemicals, attitude and supplemental environmental projects. ERP, p.8.

The first adjustment factor, voluntary disclosure is not applicable to the case at bar because the violations were discovered as a result of an inspection.[24] ERP, p.14.

The attitude adjustment factor with its two components, cooperation and compliance, was not applied in this case because of Complainant's practice of limiting application of the factor to settlement discussions. The supplemental environmental project adjustment, like the attitude adjustment is also limited

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[23] ERP,p.18.

[24] Transcript at 58, lines 3 to 11.

in its application by Complainant to settlement discussions.[25]

The adjustment factor for delisted chemicals is applicable in this case. Acetone was delisted effective June 16, 1995, and the fixed reduction percentage in the proposed civil penalty taken from page 17 of the ERP, 25% has been applied in this document.[26]

Adjustment of the proposed civil penalty by supplemental environmental projects ("SEP") was never accomplished by the parties because an SEP was never presented by Respondent for consideration and evaluation by Complainant.

4. EPA Has Met The Burden That The Proposed Penalty Is Appropriate.

Section 22.24 of the Rules of Practice, 40 C.F.R. Part 22, places the burden of proof regarding the "appropriatness" of the penalty on Complainant. Judge Reich writing for the Environmental Appeals Board in *In re: Employers Insurance of Wausau and Group Eight Technology, Inc.* said:

> The complainant's burden under TSCA § 16 and 40 C.F.R. § 22.24 is only to demonstrate that it 'took into account'

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[25] Transcript at 37, line 25, and Transcript at 38, lines 1 to 25, and Transcript at 54, lines 11 to 20.

[26] Transcript at 54, lines 2 to 10, and Transcript at 73, lines 1 to 6.

> certain criteria specified in the statute, and that its proposed penalty is 'appropriate' in light of those criteria and the facts of the particular violations at issue. To satisfy the complainant's initial burden of going forward, it should ordinarily suffice for the complainant to prove the facts constituting the violations, to establish that each factor enumerated in TSCA § 16[27] was actually considered in formulating the proposed penalty, and to explain and document with sufficient evidence or argument how the penalty proposal follows from an application of the section 16 criteria to those particular violations.

In re: Employers Insurance of Wausau And Group Eight Technology, Inc.(1997), TSCA Appeal No. 95-6, p.33.

Complainant's initial burden, to prove the facts constituting the violations was met upon the issuance of the Order Granting Motion for Accelerated Decision dated January 10, 1995, signed by the Presiding Administrative Law Judge. The argument set forth in this Part IV.b. clearly establishes that each factor enumerated in TSCA § 16(a)(2)(B) was actually considered in formulating the penalty proposed in the action and how the penalty proposal follows from an application of the criteria set forth in Section 16(a)(2)(B) to the violations charged in the Complaint.

c. <u>The ERP Ensures That Enforcement Actions Are Fair, Uniform and Consistent</u>.

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[27] The penalty criteria set forth in Section 16(a)(2)(B) of TSCA applied in *Employers* is applicable to the instant action by virtue of Section 325(b)(2) of EPCRA which provides for Class II administrative penalties, and requires that civil penalties be assessed in the same manner and subject to the same provisions, as civil penalties are assessed under Section 2615 of Title 15.

> The Agency has issued penalty policies to create a framework whereby the decisionmaker can apply his[Sic] discretion to the statutorily-prescribed penalty facts, thus facilitating the uniform application of these factors.

In re: Mobil Oil Corp.(1994), EPCRA Appeal No. 94-2, p.30.

The ERP sets forth a comprehensive, rational and reasonable framework for applying each of the statutory factors to the facts of a case and places each type of violation in context with the other types of violations. The policy is designed to promote deterrence, fair and equitable treatment of the regulated community and swift resolution of environmental problems.

Consistency is a fundamental element of fairness in administrative adjudications, and EPA's enforcement program is credible only to the extent that penalties are assessed in a consistent manner. The use of the ERP ensures that EPCRA enforcement will be consistent nationally.

Another important consideration in assessing penalties is deterring violations: The penalty must be high enough to deter the person charged with violating EPCRA, and discourage other members of the regulated community from repeating the violation.

The ERP is based on the statutory criteria set forth in pages 17 through 26 above, with the determination of a gravity-based penalty based on the nature, extent, circumstances and gravity of the violations as set forth in a penalty matrix. Once

the gravity-based penalty is determined, upward or downward adjustments may be made to the determined amount based on statutory factors of culpability, history of prior violations, ability to continue in business and such other factors as justice may require and factors that are incorporated into the ERP such as voluntary disclosure, delisted chemicals, attitude and supplemental environmental projects. ERP, p.8. These adjustments are carefully balanced to assure that mitigating or aggravating factors appropriately influence the amount of the penalty, yet do not change the penalty disproportionately relative to other comparable violations.

The total penalty is determined by calculating the penalty for each violation on a per chemical, per year, per facility basis. ERP, p.13. This approach ensures that the public will obtain information about each and every chemical subject to EPCRA. The Trier of Fact is required to consider the ERP in assessing a penalty. 40 C.F.R. § 22.27(b); *Riverside Furniture*, p.5.

The proposed penalty set forth in the Complaint is rationally related to the harm in this case, consistent with penalties in other cases with similar fact patterns and not arbitrary and capricious.

V. PENALTY REDUCTION SHOULD NOT BE BASED UPON RESPONDENT'S ARGUMENTS THAT THE VIOLATIONS WERE UNINTENTIONAL OR THAT RESPONDENT COMPLIED WITH OTHER ENVIRONMENTAL LAWS.

Without identifying it as such, Respondent's case-in-chief was composed extensively of testimonial evidence that was designed to achieve a reduction in the civil penalty on an equitable basis through the application of the rubric, "other matters as justice may require."[28] As noted on page 24 above, the ERP teaches that the application of the factor is expected to be rare and thoroughly documented.

a. Respondent Is Charged With Knowledge Of The Law.

Respondent's sole witness at the hearing before the Presiding Administrative Law Judge on January 28, 1997, was Gerald Bert Douglas, Vice President of Catalina Yachts, Inc.[29] At the end of Mr. Douglas' direct testimony the following exchange took place:

> Mr. Meeder: Would you, as my last question, simply explain to the Court why Catalina Yachts did not file Form Rs for the years in question with regard to its Woodland Hills' facility?
>
> Mr. Douglas: Mainly because I didn't know about it. I mean,

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[28] *Supra, p.24.*

[29] Transcript at 78, line 23 and at 79, line 13.

> I am probably the culprit, it is my responsibility to know about these forms, and I just didn't know.[30]

Respondent's argument that the penalty should be reduced because Respondent was not aware of EPCRA at the Facility and that its violation of EPCRA was unintentional is without merit because Respondent is charged with knowledge of the law and should have been aware of the requirements of EPCRA.

It is well settled law that all persons are charged with knowledge of United States codes as well as regulations and rules promulgated thereunder and published in the Federal Register. 44 U.S.C. § 1507; *Federal Crop Ins. v. Merrill*, (1947), 332 U.S. 380, 384-385; *T.H. Agriculture and Nutrition Co.* (1984), TSCA VII-83-T-191, p.11; *Colonial Processing, Inc.* (1991), Docket No. II EPCRA-89-0114, pp. 20-21; *Riverside Furniture*, p.5.

Further, the fact that Respondent was unaware of EPCRA does not provide a basis to reduce a penalty. Apex Microtechnology (1993), Docket No. EPCRA-09-92-00-07, p.18. EPCRA was enacted into law in 1986, almost seven years before the inspection which led to the filing of the Complaint.[31] Since that time EPA has

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[30] Transcript at 119, line 25 and at 120, lines 1 to 7.

[31] Exhibit A,p.3 ¶7, and Exhibit 2.

conducted workshops as EPCRA outreach. Since enactment of EPCRA the Agency has conducted a minimum of two compliance assistance workshops in California each year. At least one of these workshops was held in Southern California. Notice of the workshops were mailed out to companies like Respondent who had more than 100 employees by EPA every year beginning in 1987 and continuing at least through 1995. The database maintained by EPA shows that Respondent was on the mailing list for these mailings at least in 1987 and 1993.[32]

Based upon the outreach programs by EPA, Respondent should have known the reporting requirements of EPCRA. *Riverside Furniture*, p.7. (The success of outreach programs is predicated on what the respondent should have known as a result of outreach efforts.) "The failure of a corporation to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law." *Riverside Furniture, p.7,n.2.*

In addition, public policy requires that a penalty not be

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[32] See attached letters dated March 14 and 22, 1995, addressed to David M. Jones, Assistant Regional Counsel, signed Robert D. Wyatt for Beveridge & Diamond, with a copy of each letter to Spencer T. Nissen; and letter dated March 29, 1995, addressed to Robert D. Wyatt, Esquire, Beveridge & Diamond, signed David M. Jones, Assistant Regional Counsel, with a copy to Spencer T. Nissen, Administrative Law Judge regarding "outreach information".

reduced on the basis of a respondent claiming to be ignorant of the law. Such reductions would encourage ignorance of the law and should be avoided. This is especially true with regard to Respondent whose place of business is located in a suburban Los Angeles community.[33] Los Angeles County is a major metropolitan area providing immediate communications with the world on every level.

Since enactment of EPCRA EPA has conducted numerous EPCRA Workshops in the Los Angeles and Burbank areas. Either location is close to the Facility. Respondent apparently ignored the Workshop announcement on a consistent basis. Therefore, no penalty reduction should be made on the basis of Respondent's lack of knowledge of EPCRA.

b. Compliance With Other Environmental Laws Does Not Support A Reduction In Penalty.

Respondent has argued that the penalty should be reduced in this matter based on Respondent filing reports with local agencies on the use of resins containing styrene, the use of acetone and air emissions resulting from such use.[34] In support

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[33] Transcript at 79, lines 1 to 10.

[34] See Respondent's Exhibits R-3, 4 and 5.

of these claims Respondent has submitted to Complainant and entered as an exhibit on the record of this proceeding a document marked as Exhibit R-3 which was submitted to the Los Angeles City Fire Department by a letter dated February 20, 1989, signed Brian Parker, Catalina Yachts.[35] In addition, two other documents submitted to South Coast Air Quality Management District covering Respondent's emissions data for the years 1988 and 1989 were entered on the record as Exhibit R-4 and R-5. According to Respondent the forms submitted to the Fire Department and the Air Quality Management District provided similar information as that required on Form Rs under EPCRA.

Section 313 of EPCRA requires the submission of data that is chemical specific. The information submitted on the Form Rs is not only chemical specific but, includes releases to air (fugitive and stack), water and land, and treatment on site and transfers off site.[36]

The testimony of Complainant's witness, Dr. Pam Tsai, shows that with respect to Exhibit R-3, releases to air, water or land

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[35] Transcript at 19, lines 24 and 25, Transcript at 20, lines 1 to 3, Transcript at 21, lines 20 to 25, Transcript at 22, lines 1 to 15.

[36] Transcript at 48, lines 12 to 25, at 49, lines 1 to 3.

are not shown. In addition, R-3, unlike Form R, does not provide information as to waste management practices at the Facility or information with respect to off site-site treatment, recycling or disposal of the chemicals.[37]

As for Exhibit R-4, the information reported in this exhibit is limited to releases to the air. In addition, the information given is limited to organic gases. The Exhibit R-4 form contains no information which will inform the public as to the releases of styrene.[38]

The information submitted by Respondent on Exhibit R-5 does not provide the same information as the Form R. The information provided is not compiled in a national database made available to the public. The form contains information regarding styrene emissions, but is silent as to acetone emissions.[39]

The information submitted by Respondent in lieu of the Form Rs does not contain the comprehensive information that is to be reported under Section 313 of EPCRA. Compliance with other environmental laws such as the laws of the State of California or

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[37] Transcript at 48, lines 12 to 25, at 49, lines 1 to 3.

[38] Transcript at 49, lines 23 to 25, at 50, lines 1 to 4.

[39] Transcript at 50, lines 5 to 17.

local agencies, does not relieve Respondent of its obligation to comply with EPCRA, nor does it provide a basis for reduction or mitigation of the penalty. *In re: Apex Microtechnology, Inc.* (1993), Docket No. EPCRA-09-92-00-07, pp. 5-6; *In re: Pacific Refining Co.* (1994), EPCRA Appeal No. 94-1, pp. 18-19 and n.19.

In *Apex*, respondent submitted reports to an air district providing information regarding annual usage of the same chemicals that it was required to report on under EPCRA. *Apex*, p.5. *Apex* argued, as Respondent here, that although it did not file its Form Rs, it did in fact disclose the equivalent information. *Apex*, p.6. The tribunal deciding that action rejected the argument and held that "there is no basis in the ERP to support a reduction or mitigation of the penalty because other reports were filed with local authorities." *Apex*, p.14. see also *Pacific Refining Co*, p.19 and n.19.

Further, Section 313 of EPCRA requires that Respondent provide the information to EPA and to the State of California, not just to local agencies. see e.g. *Pacific Refining Co.*,pp. 18-19. Congress recognized that EPCRA would collect information that might have already been reported under other environmental laws, but passed EPCRA so that the information would be comprehensive and easy to access by the general public. In the

debate on the bill, Senator Lautenberg stated: "The information maybe scattered in air files, water files, and on RCRA manifest forms, for example, but not pulled together in one place to provide a complete usable picture of total environmental exposure." 131 Cong.Rec. S11776 (daily ed. Sept. 19, 1985) (statement of Sen. Lautenberg).

Thus, no reduction in the penalty should be made by the Trier of Fact based upon the fact that Respondent filed other reports with local agencies.

VI. PENALTY REDUCTION SHOULD NOT BE BASED ON RESPONDENT'S CLAIMS OF EXPENDITURES CONSTITUTING "PAST PROJECTS."

The testimonial evidence on the record of this proceeding by Respondent regarding five past projects requires the Presiding Administrative Law Judge to determine whether, as a matter of equity, these past projects are to be recognized and the civil penalty assessed against Respondent reduced as a result thereof under the rubric "other factors as justice may require."[40]

a. Testimonial Evidence Of Past Acts.

Respondent's witness, Gerald Douglas, testified extensively at the hearing regarding what was described at one time as

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[40] See discussion of ERP guidance in applying this factor p.24 *supra*.

mitigating factors[41] and at other times as environmentally beneficial expenditures.[42] These mitigating factors included voluntarily adopting the use of a chemical solvent known as MBE as a substitute for acetone. Mr. Douglas testified that the change from acetone to DBE was accomplished at a material cost to Respondent and resulted in a substantial reduction of VOC emissions.[43]

Mr. Douglas also testified regarding a service performed by Respondent identified as anti-fouling bottom painting. The painting of boat bottoms was voluntarily terminated by Respondent in 1994 resulting in a loss of revenue to Respondent because customers were charged a fee for having the bottom of their boats painted.[44]

Mr. Douglas described the use of a brushable gel-coat to be distinguished from spray gel-coat in the manufacturing of boats at the Facility. According to Mr. Douglas, the use of the brushable gel-coat product resulted in a reduction of styrene

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[41] Transcript at 107, line 24.

[42] Transcript at 117, lines 1 to 3, Transcript at 118, lines 13 to 17, Transcript at 119, lines 23 and 24.

[43] Transcript at 109 to 112.

[44] Transcript at 113, lines 18 to 25, Transcript at 114, lines 1 to 14.

emissions, but increased the per unit costs to manufacture the boats.[45]

Mr. Douglas' testimony regarding the emission reductions effected at the Facility through manufacturing operations changes concluded with the description of their shift from spirit to water-based contact cement. According to Mr. Douglas, the water-based cement, though more expensive than the spirit-based contact cement, resulted in no emissions of VOCs resulting from the application of the water-based contact cement.[46]

When asked why the foregoing four changes were undertaken by Respondent, Respondent's witness gave three reasons. The reasons given were: healthier work environment, minimize nuisance odors in the neighborhood and to promote good public relations. Knowledge of these projects is expected to please their boat-buying customers. No claim was made at the hearing by either the witness or Respondent's counsel that any of the projects or expenditures mentioned were presented to EPA at any time prior to the hearing for evaluation by EPA as environmentally beneficial expenditures.

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[45] Transcript at 114, lines 15 to 25, Transcript at 115, lines 1 to 25, Transcript at 116, at lines 1 to 25

[46] Transcript at 117, lines 14 and 15.

Mr. Douglas was asked on direct examination to describe the "ourtreach programs you have to local communities with regard to informing them concerning the nature of your operations and the materials that are used in your facility."[47] This statement by counsel in the form of an interrogatory introduced the subject of tours at the Facility.

Mr. Douglas testified that most people who went on the tours were concerned about odors and that the source of the odors was the styrene used in the manufacture of the boats.[48] According to Mr. Douglas the tours have been going on at the Facility since 1986. The tours are every Thursday at 4:00 o-clock p.m. and last approximately one hour. There are from ten to twenty people for every tour and they are people from the surrounding community as well as boat owners interested in observing a boat manufacturing operation.[49]

Mr. Douglas described a weekend open house at the Facility which took place sometime in 1991. This was a two day event that according to Mr. Douglas, was intended to make the neighborhood

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[47] Transcript at 99, lines 21 to 24.

[48] Transcript at 101, lines 10 to 18.

[49] Transcript at 101, lines 20 to 22, Transcript at 102, lines 1 to 25, Transcript at 103, lines 1 to 8.

aware of the manufacturing operations at the Facility.

b. Respondent's Past Projects Do Not Qualify As Supplemental Environmental Projects.

The past projects discussed by Respondent's witness do not meet the criteria of an environmentally beneficial expenditure that is recognizable under the Interim Revised EPA Supplemental Environmental Projects Policy effective May 8, 1995. That Policy defines supplemental environmental projects as "environmentally beneficial projects which a . . . respondent agrees to undertake **in settlement of an enforcement action**, but which the . . . respondent is **not otherwise legally required to perform**."[50] [Emphasis found in the Text]

The expenditures which were the subject of Respondent's case-in-chief are not related to any settlement of the case at bar and were not made in accordance with the Interim Revised EPA Supplemental Environmental Projects Policy effective May 8, 1995, or the policy which the May 8, 1995, policy supersedes. All of the expenditures introduced through the testimony of Respondent's witness were commenced at some time prior to the hearing.

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[50] Section B. Definition and Key Characteristics Of A SEP, Interim Revised EPA Supplemental Environmental Projects Policy, Effective May 8, 1995, p.3.

The Revised SEP Policy provides a definition for "in settlement of an enforcement action" which "means: 1)EPA has the opportunity to help shape the scope of the project **before** it is implemented; and 2) the project is not commenced until after the Agency has identified a violation." [Emphasis Added][51] The conversion from acetone to another solvent, the tours of the Facility and open house were commenced prior to the November, 1993, EPA inspection of the Facility. All of the other past projects were started at sometime after the inspection and prior to the hearing. At no time were the projects presented to EPA to help shape the scope of the projects prior to their implementation as provided in the Revised SEP Policy.

c. Respondent Has Failed To Meet The Proof Standard To Obtain Credit For Past Acts.

The expenditures discussed by Respondent's witness may be classified as "past acts." The Environmental Appeals Board dealt with expenditures which are past projects in *Spang & Company*[52] and set forth in their decision future guidance for the Agency. Pertinent portions of the Board's guidance applicable to the case

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[51] Revised SEP Policy,p.4.

[52] *In re: Spang & Company*(1995), EPCRA Appeal Nos. 94-3 & 94-4,pp.58-62.

at bar are:

> . . .[T]he past acts of violators have historically been approprite for consideration when assessing a penalty. . . [t]he greatest weight should go to completed projects **for which there is tangible evidence** of significant environmental benefits.[Emphasis Added]

Spang & Company, p.60.

> [T]he evidence of environmental good deeds must be clear and unequivocal, and the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice.

Spang & Company, p.59.

> Whether a project warrants a penalty adjustment, and if so, how much, will of course depend upon the evidence in the record. If a respondent claims that justice requires consideration of steps taken and monies spent on a project, a respondent needs to produce evidence of those steps and expenditures. The snapshot provided by the evidence in the record will provide the factual basis that will enable the presiding officer to determine whether justice warrants a penalty reduction for those steps and expenditures, and if so, how much. Absent such evidence, there is no factual basis for concluding that the calculated penalty will produce an injustice.

Spang & Company, p.61.

Complainant urges the Presiding Administrative Law Judge to find that Respondent failed to provide clear and unequivocal evidence to qualify the projects for penalty reduction as past acts under the *Spang* guidance for the following reasons:

1. <u>Conversion from acetone to MBE</u>.

The first of five past projects described by Respondent's witness at the hearing was Respondent's voluntary efforts "to

reduce hazardous chemical use in emissions at" the Facility by switching from acetone use as a solvent[53] "to a material called DBE."[54]

With the exception of the letter dated September 28, 1994, signed Richard S. Pepiak, Sales Representative for M. A. Hannna Resin, Distributor, entered as Respondent's Exhibit R-6, all of the evidence presented by Respondent in support of the conversion to MBE project, was oral. The Pepiak letter contains one claim regarding reduced emissions at the Facility. Overall the letter is more in the nature of a sales document for MBE than proof offered in support of Respondent's conversion project.

Spang at page 61, set forth above, teaches that "[w]hether a project warrants a penalty adjustmet, and if so, how much, . . . depends upon the evidence in the record. If a resondent claims that justice requires consideraton of steps taken and monies spent on a project, a respondent needs to produce evidence of those steps and expenditures."

Respondent could have provided documentary evidence such as checks, invoices and affidavit(s) in support of the

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[53] Transcript at 106, lines 1 to 4.

[54] Transcript at 104, lines 10 to 25, Transcript at 105, lines 1 to 5.

representations made with respect to capitalized costs incurred during the two and one-half years that it took to make the conversion from acetone to MBE.[55] Respondent mentioned the increased annual operating costs resulting from the conversion[56] but no mention was made of any savings resulting from the conversion; hence, the snapshot of the expenditures is incomplete. Respondent failed to mention that if the emission of VOCs was substantially reduced as a result of the conversion from acetone to MBE, then Respondent's annual fees to the South Coast Air Quality Management District[57] would also be reduced substantially as well. Reducing emissions also provides Respondent with marketable emission credits that are highly profitable in the hands of Respondent. There may be other savings to Respondent that result from the solvent reduction conversion, such as the use of water at the Facility and the use of the stacks which blow the VOC emissions into the air.[58] The testimonial evidence of the expenditures incurred by Respondent is only part of the story. The net expenditures, that is, costs

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[55] Transcript at 105, lines 7 to 14.

[56] Transcript at 110, lines 14 to 23.

[57] Exhbit R-4.

[58] Transcript at 101, lines 3 to 9.

incurred offset by credits and allowances, are all facts that the Trier of Fact is entitled to have in making a determination as to whether credit against the penalty is to be granted to the Respondent.

The reduction in emissions is the goal which makes the claimed expenditures involved in the project environmentally beneficial. Yet, Respondent's only evidence of emission reduction is the testimony of its sole witness at hearing and a statement in the letter, Exhibit R-6. In establishing the claimed achievement in emission reduction in a "clear" and "unequivocal" manner, Respondent should be required to present as a minimum, a record of ambient air monitoring before and after completion of the conversion project.

Complainant urges the Trier of Fact to find that while the reduction of acetone emissions at the Facility is a worthy project, evidence in support of the project falls far short of the quality of evidence stated in the Board's guidance in *Spang*.[59]

Evidence of the project in terms of net expenditure of funds and documentation of the emission reduction achieved is solely

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[59] *Id*.n.52 *supra*, pp.40 and 41.

within the control of Respondent. The Trier of Fact should have more than mere oral statements to rely on as evidence of the project.

On the basis of Respondent's failure to present adequate proof of net expenditures incurred in the conversion project and to show documentation of the effect of the conversion, that is emission reduction at the Facility, the Presiding Administrative Law Judge is urged to deny Respondent any credit as a reduction of the civil penalty to be assessed against Respondent in this action.

2. Termination of the anti-fouling bottom paint service.

According to Mr. Douglas, Respondent painted its last boat bottom in 1994.[60] The paint to which Mr. Douglas referred is applied to the bottom of the boats as a service to Respondent's customers to prevent "growth" on the bottom of the boats.[61] Revenue loss is the environmentally beneficial expenditure for which Respondent seeks credit against the civil penalty to be assessed in the instant action.

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[60] Transcript at 114, line 7.

[61] Transcript at 113, line 22.

No description of the paint's toxic ingredients which were offensive to the environment or toxic to the growth that was being controlled by applying the paint to boat bottoms, was presented at the hearing either orally or in writing. Respondent's witness stated that there was a mark-up on Respondent's cost which generated revenues, but no detail was given as to the identification of the materials used, the VOCs or other toxics emitted by such materials, the costs incurred by Respondent in obtaining such materials, the mark-up and/or the per-boat revenue recovered by Respondent. Mr. Douglas's testimony was limited to a per year estimate of the revenues lost to Respondent as a result of the discontinuance of the bottom paint service.

If Respondent performed the service on a job order basis, that is, each boat was considered a separate job, then Respondent's financial records could be expected to show the number of boats painted during each year the service was available, the costs, including direct labor, materials and overhead per boat, the revenue recovered per boat and the total revenues realized by Respondent for any week, month or year the service was performed. Respondent failed to present such evidence at the hearing.

The evidence presented by Respondent is inadequate proof of the amount of the expenditure to be acknowledged in determining a credit to Respondent against the civil penalty. The evidence presented does not establish in a "clear" and "unequivocal" manner that the termination of the painting service is beneficial to the environment. Further, the *Spang* guidance teaches that there must be a nexus between the project and the violation charged in the Complaint to warrant a penalty reduction.[62] No such nexus was shown by the evidence presented on the record by Respondent.

Complainant urges the Trier of Fact to find that the Respondent failed to present clear and unequivocal evidence of the anti-fouling bottom paint service, and its relationship to Section 313 of EPCRA as required by the *Spang* guidance. Complainant contends that the evidence presented by Respondent regarding the discontinuance of the anti-fouling bottom paint service and its relationship to Respondent's duties under Section 313 of EPCRA is so scant that the Trier of Fact is given no basis that warrants acknowledgement of Respondent's past project through the reduction of the civil penalty under the rubric

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[62] *Id.*n.52 supra,pp.61-62.

"other matters as justice may require."

3. Brushable gel-coat for the outside surface of the boats.

Spang teaches that in considering past acts for credit against the penalty to be assessed "[t]he greatest weight should go to completed projects for which there is tangible evidence of significant environmental benefits."[63]

The third project introduced through Mr. Douglas' testimony has to do with the use of a brushable gel-coat as opposed to a sprayed gel-coat.[64] According to Mr. Douglas, the brushable gel-coat which is applied to the exterior of the boat, reduces the VOC emissions.[65]

The use of a brushable gel-coat was instituted in November of 1996 so that all of the results of the operations change at the Facility included in Mr. Douglas' testimony are conjectural and hoped for results. Mr. Douglas' testimony as to the effect of the operations change was not accompanied by documentation in the form of cost analyses to measure the cost differential and

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[63] *Id.*n.52 *supra*,p.60.

[64] Transcript at 115, lines 1 to 4.

[65] Transcript at 115, lines 13 to 14.

monitoring data showing actual reduction in VOCs achieved as a result of the project. There is no evidence on the record in this proceeding which satisfies the *Spang* requirement of "tangible evidence of significant environmental benefits."[66]

The required nexus between the project and the violation charged in the Complaint was not established by Respondent.[67] Finally, there was no evidence either written or oral, regarding whether or not there is recovery through the pricing of the boats sold of any of the increased costs, the beneficial expenditure, resulting from the described operations change.

Complainant urges the Trier of Fact to find that Respondent has presented insufficient evidence regarding the project involving the change to brushable gel-coat and how such change qualifies for a reduction in the penalty to be assessed against Respondent. For the reasons stated herein above, Complainant urges the Trier of Fact to allow no credit in favor of Respondent with respect to the penalty, under the rubric "other matters as justice may require" based on the change from sprayed gel-coat to brushable gel coat.

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[66] *Id.*n.62.

[67] *Id.*

4. Shift from spirit to water-based contact cement.

Spang teaches that in considering past acts for credit against the penalty to be assessed "[t]he greatest weight should go to completed projects for which there is tangible evidence of significant environmental benefits."[68]

Mr. Douglas testified that approximately 18 months ago he found some new water-based contact cements that could be used in connection with furnitures components that go inside the boats that are constructed by Respondent.[69] According to Mr. Douglas, these new unidentified water-based products have no VOCs.[70]

Again, no documentary evidence such as purchase invoices, cost analyses or monitoring results was presented to show that there was an expenditure, the amount expended and that the expenditure was beneficial to the environment, that is, no VOCs. Neither the cements currently in use at the Facility nor the cements that were used before the change were identified. Complainant contends that the required nexus between the project reported and the violation charged in the action was not

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[68] *Id.*

[69] Transcript at 117, lines 11 to 15.

[70] Transcript at 117, lines 11 to 15.

established by Respondent. Complainant further contends that the evidence presented by Respondent fails to qualify as real tangible evidence of significant environmental benefits.

Complainant urges the Trier of Fact to apply the guidance presented by the Board in *Spang* as the basis for a finding that no allowance can be given for the project involving the change of cements used in the manufacturing operation at the Facility, toward reducing the penalty to be assessed against Respondent.

5. Plant tours to reduce public fears.

Mr. Douglas' testimony was the only evidence presented at the hearing with respect to outreach involving tours and open house at the Facility. Complainant contends that a nexus between the outreach program at the Facility in the form of tours and an open house and the violation of Section 313 of EPCRA charged in the Complaint was never established through the evidence presented by Respondent at the hearing.

It is reasonable to assume that the sale of the boats manufactured by Respondent was the prime motive for the tours and open house as opposed to educating the public with respect to chemical use and odors at the Facility as suggested by Mr.

Douglas.[71] It is reasonable to assume that the names and addresses of visitors were probably collected at some point during the tours or open house to facilitate follow-up sales promotion.

During the tours Respondent tries to educate the people in attendance that the "smoke stacks" are used to take the air from the ground and shoot it up so the odor from styrene is not detectable. The "education" is aimed at reducing public fear that the stacks are related to combustion.

Mr. Douglas' testimony did not include, and no evidence was presented by Respondent, which shows that those attending the tours or open house were presented with information regarding the large quantities of chemicals which were routinely released from the Facility or associated with the uses and releases of acetone or styrene, a potential carcinogen, or any other chemicals.[72]

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[71] Transcript at 99, lines 21 to 24.

[72] History of releases to the air taken from Form Rs submitted by Respondent is as follows:

1988 - Acetone/Styrene 424,266 pounds
1989 - Acetone/Styrene 262,308 pounds
1990 - Styrene 102,429 pounds
1991 - Styrene 62,406 pounds
1992 - Styrene 75,117 pounds.

Both acetone and styrene monomer are flammable and present a fire

In *Spang* the Board states in clear language that "the amount of credit which is allowable for environmentally beneficial projects must be tempered with the knowledge that a violation has taken place."[73] The Board goes on to state the view that the quality of evidence required is to be "clear" and "unequivocal." Finally the Board states that "the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice."[74]

Complainant urges the Presiding Administrative Law Judge to determine that based on the record of this action a reasonable person would agree that Respondent in presenting evidence of the five projects, has not met the standard of the *Spang* guidance that warrants the giving of credit against the civil penalty sought by Complainant.

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hazard. In addition, styrene is a very reactive compound that has explosion hazard. Acetone and styrene have distinct odor and can cause irritation to eyes, nose, throat and the respiratory system. Exposure to acetone and styrene has potential to cause damages to kidneys, liver and nervous system. Styrene is considered a possible human carcinogen. Exhibit A,p.7¶13.

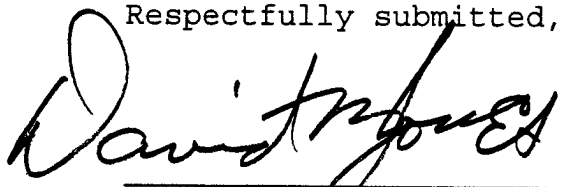
[73] *Id.*n.62 *supra*,p.59.

[74] *Id.*

VI. CONCLUSION. Based on the foregoing, it is respectfully requested that an Initial Decision issue in favor of Complainant and that a penalty of ONE HUNDRED SIXTY-TWO THOUSAND FIVE HUNDRED DOLLARS be assessed against the Respondent.

Dated: April 14, 1997.

Respectfully submitted,



Counsel for Complainant

Attachement -- 2 letters

LAW OFFICES
BEVERIDGE & DIAMOND
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION
SUITE 3400
ONE SANSOME STREET
SAN FRANCISCO, CA 94104-4438
(415) 397-0100
TELECOPIER (415) 397-4238

ROBERT D. WYATT
DIRECT DIAL NUMBER
(415) 983-7701

BEVERIDGE & DIAMOND, P. C.
SUITE 700
1350 I STREET, N. W.
WASHINGTON, D. C. 20005-3311
(202) 789-6000

40TH FLOOR
437 MADISON AVENUE
NEW YORK, N. Y. 10022-7380
(212) 702-5400

BEVERIDGE & DIAMOND
ONE BRIDGE PLAZA
FORT LEE, N. J. 07024-7502
(201) 585-8162

March 14, 1995

VIA FACSIMILE/MAIL

David M. Jones, Esq.
Office of Regional Counsel RC-2-1
U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

In re: Catalina Yachts, Inc.
EPCRA No. 09-94-0015

Dear Mr. Jones:

In previous correspondence you indicated that you would be furnishing proof of EPA's EPRCA information outreach program for facilities subject to SARA § 313 within Region IX, and specifically Catalina Yachts. You indicated that such information would be provided in Region IX's exchange ordered by Judge Nissen.

We are now in receipt of Region IX's information exchange documents dated March 10, 1995 and note that no such information has been provided. Accordingly, we conclude that no such information exists. If we are in error and Region IX has simply failed to furnish such information, please forward substantiating documentation at your earliest convenience.

Thank you for your cooperation in this matter.

Very truly yours,

Robert D. Wyatt

RDW:ha
cc: Spencer T. Nissen
Administrative Law Judge
1400.3433.06

LAW OFFICES
BEVERIDGE & DIAMOND
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION
SUITE 3400
ONE SANSOME STREET
SAN FRANCISCO, CA 94104-4438
(415) 397-0100
TELECOPIER (415) 397-4238

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(212) 702-5400

BEVERIDGE & DIAMOND
ONE BRIDGE PLAZA
FORT LEE, N. J. 07024-7502
(201) 585-8162

ROBERT D. WYATT
DIRECT DIAL NUMBER
(415) 983-7701

March 22, 1995

VIA FACSIMILE/MAIL

David M. Jones, Esq.
Assistant Regional Counsel
United States Environmental
Protection Agency
Region IX
75 Hawthorne Street
San Francisco, California 94105

Re: Catalina Yachts, Inc.
Docket No. EPCRA 09-94-0015

Dear Mr. Jones:

We acknowledge receipt on March 22, 1995 of your letter dated March 18, 1995 regarding your previous representations that "outreach information" regarding the SARA § 313 program was sent to our client, Catalina Yachts, Inc., and that verification of that representation is in EPA's possession. The first paragraph of your letter appears to reconfirm your prior assertion.

The purpose of our March 14th letter was to obtain such information if it exists. Your reply appears to suggest that such information exists but that you are deliberating whether to provide it to my client. We respectfully repeat our request to provide the information forthwith by means of informal discovery, rather than having to file a discovery motion to obtain the same.

We would appreciate your accommodating this request by close of business Friday, March 24, 1995.

Thank you in advance for your cooperation in this matter.

Very truly yours,

Robert D. Wyatt

RDW:ha
cc: Spencer T. Nissen
1400.3433.07

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

March 29, 1995

Robert D. Wyatt, Esquire
BEVERIDGE & DIAMOND
One Sansome Street, Suite 3400
San Francisco, CA 94104-4438

Re: Catalina Yachts, Inc.
Docket No. EPCRA-09-94-0015

Dear Mr. Wyatt:

Receipt of your letter of March 22, 1995, regarding the subject administrative enforcement action is hereby acknowledged. Your aforementioned letter "requests" a copy of the "outreach information" regarding your client that is in our possession. Accordingly, we are forwarding to you the document to which we made reference on page 2 of our letter to you dated January 31, 1995, which has been the focus of your recent correspondence. A copy of our January 31, letter is also enclosed for your convenience.

On page 3 of your letter of January 27, 1995, you made the statement that is repeated on page 5 of our letter of January 31. Our response to your statement follows in the first paragraph on page 5 which **requests** copies of your client's Income Tax Returns for the five year period preceding the issuance of the Complaint and Notice of opportunity for Hearing in this matter. While you have requested and are by this letter receiving information in our possession, we've not seen the reciprocal to date. Accordingly, we hereby request that you make the Income Tax Returns requested available to us on or before April 15, 1995.

Sincerely yours,

David M. Jones
Assistant Regional Counsel

Enclosures

cc: Spencer T. Nissen
Administrative Law Judge

Regional Hearing Clerk
Region 9

Records Organize Go To Exit

LOC_NUM	006272157
COM_NUM	007516990
LOC_NAME	CATALINA YACHTS INC
STR_ADD	21200 VICTORY BLVD
CITY	WOODLAND HLS
STATE	CA
ZIP	91364
PHONE	8188847700
EMP_LOC	000060
OUT_LOC	000021
TOT_EMP_UL	0030412
TOT_SA_UL	0019781
PRIM_SIC	3732
PRIM_SICMO	
SEC_SIC	
SEC_SICMO	
TER_SIC	
TER_SICMO	
HDQ_CODE	2
MSA_CODE	4480
STATE_FIP	06

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1987 TICKET Data Base

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COUNT_FIP	037
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PRI_OFF_TI	
PRI_OFF_DP	
PRI_OFF_LV	
OLD_COM_NU	02866
PU_PR_IND	*
ULT_CO_NAM	GULF & WESTERN INC
HDQ_ST_ADD	1 GULF & WESTERN PLAZA
HDQ_CITY	NEW YORK
HDQ_STATE	NY
HDQ_ZIP	10023
HDQ_PHONE	2123337000
HDQ_MSA	5600
HDQ_ST_FIP	36
HDQ_CO_FIP	061
COMP_RANK	S031
TICKER_SYM	GW

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F_TRI_UPDT	/ /
F_EPA_ID	CAD053873071
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F_NAME	CATALINA YACHTS INC
F_P_STREET	21200 VICTORY BLVD
F_P_CITY	WOODLAND HILLS
F_P_COUNTY	LOS ANGELES
F_P_STATE	CA
F_P_ZIP	91364
F_P_MSA	4480
F_M_STREET	P O BOX 989
F_M_CITY	WOODLAND HILLS
F_M_STATE	CA
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F_SICCODE2	
F_SICCODE3	

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1993 ETS System

Records Organize Go To Exit

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F_NUMB_CON	00
F_LAT	00341006
F_LONG	01183606
F_PHONE_NO	818-884-7700
F_SIT_CONT	FRANK W BUTLER
F_SIT_TITL	PRESIDENT
F_EPA_CONT	
F_EC_TITLE	

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Records Organize Go To Exit

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F_EC_PHONE	
F_EC_STRET	
F_EC_CITY	
F_EC_STATE	
F_EC_ZIP	

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing Post Hearing Brief was filed with the Regional Hearing Clerk, Region 9 and that a copy was sent by First Class Mail to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, Room 3706 (1900)
Washington, D. C. 20460

and to:

Robert D. Wyatt, Esquire
Eileen M. Nottoli, Esquire
BEVERIDGE & DIAMOND
One Sansome Street, Suite 3400
San Francisco, California 94105

4-14-97
Date

Laura Michael
Office of Regional Counsel
U. S. Environmental Protection Agency, Region 9

Robert D. Wyatt, Esq.
James L. Meeder, Esq.
Eileen N. Nottoli
BEVERIDGE & DIAMOND
One Sansome Street, Suite 3400
San Francisco, CA 94104-4438
Telephone: (415) 397-0100

Attorneys for Respondent
Catalina Yachts, Inc.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
CATALINA YACHTS, INC.	)	
	)	
Respondent.	)	Docket No. EPCRA-09-0015
	)	
	)	
	)	
	)	

REPLY BRIEF OF CATALINA YACHTS, INC.

I. Preliminary Statement

The facts compel the conclusion that Region 9's proposed penalty of $162,500 is not appropriate. Region 9's "Proposed Findings of Fact, Conclusions of Law and Brief" ("Reg. 9's Brief") ignores most of the facts and most of the criteria to be used as guidelines in determining a fair and just penalty in this case. It confirms that Region 9 is interested solely in maximizing the civil penalty it will collect in this action. Such an approach should be recognized for what it is and rejected. It is neither fair, just, nor in accordance with the controlling guidelines used in determining the appropriate penalty for EPCRA reporting violations.

II. Reply Argument

A. Region 9 Has Not Met its Burden of Proof that its Proposed Penalty of $162,500 is Appropriate

Region 9 asserts that its proposed civil penalty of $162,500 "was calculated in accordance with the August 10, 1992, Enforcement Response Policy of Section 313 and Section 6607 of the Pollution Prevention Act" ("1992 ERP"), and that agency personnel "took into account" all the criteria set forth in Section 325(b)(1)(C) of EPCRA, 42 U.S.C. §11045(b)(1)(C). (Reg. 9 Br. at 7, ¶¶ 18 and 19.) The evidence in the record simply does not support this assertion.

With regard to the 1992 ERP, Region 9 admitted at the hearing that it did not consider two of its factors: the attitude (cooperation and compliance) of Catalina Yachts; and "other factors as justice may require." (Tr. 37:25 - 38:13; Exh. A, Tsai Decl. ¶ 9.) Region 9 further admitted that it ignored most of the criteria set forth in Section 325(b)(1)(C) of EPCRA. (Tr. 44:12 - 45:22; Exh. A, Tsai Decl., Exh.3.) It is undisputed that in setting the proposed penalty at $162,500 Region 9 considered only: (1) the fact that reporting violations were involved; (2) the volume of acetone and styrene Catalina Yachts used; (3) the size of the company in terms of employees and gross sales; and (4) the fact that acetone was delisted. During the cross examination of Ms. Tsai, Region 9's only witness and the person who calculated the penalty, admitted to Region 9's failure to consider most of the penalty adjustment criteria:

> Mr. Meeder: And in determining that [a proposed penalty of $162,500 was] appropriate, EPA considered first the nature of the violation, in the sense that it was a reporting failure, is that correct?
>
> A. That's correct.
>
> Q. It also considered the amount of chemical on-site, is that correct?
>
> A. Not the amount of chemicals on-site, but the amount of chemicals that get processed or otherwise used. . . .

Q. And it also considered the size of the company in terms of employees and gross sales, it that correct?

A. That's correct.

Q. And with regard to all other factors, it either didn't consider them or when it considered them, it dismissed them as not relevant to [the issues] in this case, is that correct?

A. At the time we calculated the proposed penalty, that's correct.

Q. And as you sit here today as well, correct?

A. That's correct.

(Tr. 44:12 - 45:22 (emphasis added.))

Under 40 CFR §22.24, *Region 9* has the burden of proving that the proposed civil penalty is appropriate. At the core of that burden is application of the "criteria set forth in the Act relating to the proper amount of a civil penalty" and consideration of "any civil penalty guidelines issued under the Act." 40 CFR §22.27(b). Thus, as Region 9 itself admits in its Brief, quoting Employers Insurance of Wausau and Group Eight Technology, Inc.(1997), TSCA Appeal No. 95-6, at 33, in order to meet that burden it must "demonstrate that it 'took into account' certain criteria specified in the statute, and that its proposed penalty is 'appropriate' in light of those criteria and the facts of the particular violations at issue." (Reg. 9's Br. at

27-28.)

It is undisputed that Region 9 did not "take into account" two important criteria set forth in the 1992 ERP and most of the statutory criteria. Thus, Region 9 has failed to meet its burden and establish a prima facie case for an appropriate penalty. On this basis alone, the claim for civil penalties should be dismissed.

B. Considering all Appropriate Factors, No Penalty Should be Assessed in this Case

1. Region 9's Refusal to Consider the Attitude Adjustment Factor Should Be Rejected

Region 9 seeks to dismiss the "attitude" adjustment factor (cooperation and compliance) as inapplicable "because of Complainant's practice of limiting application of the factor to settlement discussions." (Reg. 9's Br. at 26.) Just such an attempt to ignore the attitude factor was rejected by Chief Administrative Law Judge Henry B. Frazier, III in In re Apex Microtechnology, Inc., Doc. No. EPCRA-09-92-00-07 (May 7, 1993), 1993 WL256426 (E.P.A.) *6, which Region 9 unwittingly cites favorably in its Brief:

> I reject Complainant's contention that the attitude adjustment factor may be considered only during a settlement without a hearing. Such a restriction would prevent its consideration by the Administrative Law Judge following a hearing. I find no basis in the ERP for such a position.

As explained in Catalina Yachts' Opening Brief at pages 6, 7, 9, 13 and 14, it is undisputed that the employees of Catalina Yachts fully cooperated with EPA during the November 1993 inspection and thereafter promptly complied with EPCRA's reporting requirements. Such conduct supports a reduction of the proposed penalty by 15% for cooperation and 15% for compliance, or $52,500 (30% of $175,000). See In re Apex Microtechnology, supra, (holding that a 30% reduction for attitude was warranted).

2. The Nature and Circumstances of Catalina Yachts EPCRA Violations Compels A Significant Reduction of the Proposed Penalty

The undisputed facts concerning the nature and circumstances surrounding Catalina Yachts' EPCRA violations are summarized as follows: Catalina Yachts did not attempt to evade or ignore EPCRA's reporting requirements at any time. Rather, it failed to file seven reports because it was unaware of EPCRA's requirements. Prior to the November 1993 EPCRA reporting inspection, Catalina Yachts had never been contacted or received any correspondence from EPA. Catalina Yachts believed in good faith that all its air toxic reporting requirements were local, which it fully met by annually providing local regulatory agencies (the South Coast Air District and the Los Angeles Fire Department) with information concerning the use and release of acetone and styrene at its Woodland Hills plant. Catalina Yachts has

made extraordinary efforts over the years through its open house program to inform the local community concerning the materials used at its Woodland Hills plant. Catalina Yachts has never been cited for a reporting violation.

Region 9 offers essentially three arguments why these undisputed facts should not affect the proposed civil penalty: (1) EPCRA is a strict liability statute; (2) ignorance of the law is no defense; and (3) compliance with other environmental laws does not justify a reduction of the proposed penalty. (See Catalina Yachts' Opening Br. at 1-4.)

As to the first argument, the mere fact that the EPCRA imposes strict liability for its reporting violations does not mean that the maximum statutory penalty of $25,000 is mandatory. Indeed, the penalty provision at Section 325(c)(1) of EPCRA ("in an amount not to exceed $25,000 for each such violation") itself makes clear that the amount of the penalty is discretionary. Moreover, the EPCRA reporting violation case law teaches that the penalty is to be set in accordance with the criteria set forth at Section 325(b)(1(C), the application of which necessarily involves the exercise of discretion.

As to the second argument, the rule invoked by Region 9 to the effect that "ignorance of the law is no defense" has been historically applied only to issues of liability. Region 9 offers no authority to support its claim that such a rule generally

precludes consideration of the defendant's knowledge of the law in assessing a civil penalty, or in any way negates the nature, circumstance, or culpability factors in § 325(b)(1)(C).

Finally, the fact that the local air district, fire department, and community were supplied regularly with information concerning Catalina Yachts use of acetone and styrene is an important mitigation factor which goes directly to the nature and circumstances of the reporting violations. As the 1992 ERP itself states:

> The circumstance levels of the matrix take into account the seriousness of the violation as it relates to the accuracy and *availability of the information to the community, to states,* and to the federal government.

(1992 ERP, at 8; emphasis added.) Moreover, EPCRA "is intended to encourage and support emergency planning efforts at the State and local level and provide residents and local governments with information concerning potential chemical hazards present in their communities." Emergency Planning and Community Right to Know Programs, Interim Final Rule, 51 Fed. Reg. 41,570 (Nov. 17, 1986.), quoted in Region 9's Brief, at 18, fn 9. It is undisputed that this program goal was accomplished by Catalina Yachts.

Here, there is not a shred of evidence that Catalina Yachts in anyway attempted to avoid its EPCRA reporting obligations through a contrived ignorance

of the law. The record does establish that Catalina Yachts complied with all reporting obligations that were known to it. Although admittedly not in the proper form, it is undisputed that Catalina Yachts regularly provided information about the materials it used in the construction of sail boats to the community, the local air district, and the local fire department thereby accomplishing one of the central purposes of EPCRA.

In short, if the statutory penalty assessment criteria (nature and circumstances) are to have meaning, a further significant reduction of the proposed penalty is compelled by the undisputed facts. These two factors when coupled with the extent, gravity and degree of culpability factors are at least as important as the attitude factor which commands a potential 30% reduction and thus the proposed penalty should be reduced by at least an additional 30% or ($52,500).

3. Region 9's attempt to First Dismiss and then Confuse the Justice Factor is Without Merit

Region 9 asserts that the four past projects voluntarily undertaken by Catalina Yachts should not be considered in assessing the appropriate penalty because they do not qualify as supplemental environmental projects ("SEP") under EPA's 1995 Interim Revised EPA Supplemental Environmental Projects Policy which requires that such projects be undertaken by agreement in settlement of an enforcement

action. (Reg. 9's Br. at 42.)

Catalina Yachts has not invoked EPA's SEP policy. Rather, as explained in Catalina Yachts' Opening Brief, the "such other matters as justice may require" factor "vests the Agency with broad discretion to reduce the penalty *when the other adjustment factors [under the ERP] prove insufficient or inappropriate to achieve justice.*" In Re Spang & Company, EPCRA Appeal Nos. 94-3 & 94-4, Slip Op. at 27; emphasis original. Under this factor, voluntary projects which benefit the environment undertaken by respondents militate strongly in favor of reducing potential civil penalties:

> As a matter of policy, the Agency obviously looks favorably upon the undertaking of a project which benefits the environment and which goes beyond the requirements of environmental laws. By considering such behavior in a penalty assessment proceeding the Agency can provide an incentive for companies to engage in environmentally beneficial activities.

In Re Spang & Company, at 28.

Region 9 next argues that Catalina Yachts' voluntary environmental projects should not mitigate the proposed penalty because Catalina Yachts failed to prove those projects with "clear" and "unequivocal" evidence, citing the test set forth in In re Spang. (Reg. 9's Br., at 43-44.) At the core of Region 9's complaint about the nature of the evidence concerning Catalina Yachts' environmental projects is the

misguided notion that oral testimony is somehow in a lower evidentiary category than "documentary evidence such as checks, invoices and affidavit(s)." (Reg. 9's Br. at 45.) It is not.

The nature, cost, and impact of each of Catalina Yachts' projects was clearly and unambiguously testified to by Mr. Douglas. (See Catalina Yachts' Op. Br. at 9 - 11; Tr. 104 - 118.) Indeed, Region 9 acknowledges that Mr. Douglas' testimony concerning Catalina Yachts' environmental projects was "extensive." (Reg. 9's Br. at 38.) Region 9 was free to cross-examine Mr. Douglas on his environmental project testimony. For whatever reason, Region 9 did not cross-examine Mr. Douglas in any meaningful way on his environmental project testimony. His undisputed testimony is clear and unequivocal; it meets the In re Spang test.

Having failed to cross-examine Mr. Douglas, Region 9 next argues, *without any supporting evidence*, that Mr. Douglas failed to explain that by reducing acetone emissions Catalina Yachts was entitled to receive annual fee credits and created marketable emission credits. (Reg. 9's Br. at 46.) Region 9 then asserts that the trier of fact is entitled to have the "entire story" told and a clear statement of the net expenditures incurred or save by Catalina Yachts as a result of its elimination of acetone at its Woodland Hills facility. (Reg. 9's Br. at 46-47.) If Region 9 believes that Mr. Douglas misrepresented the costs (net or otherwise) Catalina Yachts

incurred in connection with its elimination of its use of acetone, which he did not, then Region 9 should either have cross-examined him on the issue or come forward with evidence to the contrary. Unsupported innuendo is neither evidence nor proper.

In short, Region 9's objections to Catalina Yachts environmental projects are not well founded. Catalina Yachts has incurred costs of $308,000 in connection with its past voluntary environmental works. It currently has ongoing future costs associated with those projects is between $91,000 and $106,000. It is in the interest of us all and particularly EPA, to encourage industry to undertake voluntary reductions of toxic air emissions, like those undertaken by Catalina Yachts. Such efforts fully justify a further significant reduction of the proposed penalty.

IV. Conclusion

The facts of this case, justice, and good government compel the conclusion that Catalina Yachts should not be penalized. A fair and just application of the relevant penalty adjustment criteria compels the same.

Dated: May 14, 1997

Beveridge & Diamond

By _____
James L. Meeder
Counsel for Catalina Yachts, Inc.

CERTIFICATE OF SERVICE

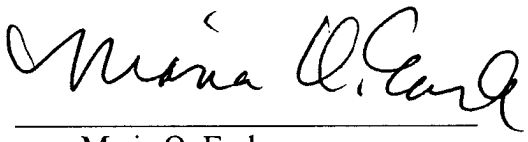
I hereby certify that the original copy of the foregoing **REPLY BRIEF OF CATALINA YACHTS, INC.** was hand-delivered to the Regional Hearing Clerk, United States Environmental Protection Agency, Region 9, and that a copy was sent by Federal Express to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, S.W., Room 3706 (A-110)
Washngton, D.C. 20460

and by First Class Mail to:

David M. Jones, Esq.
Office of Regional Counsel, RC-2-1
United States EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Date: May 14, 1997



Maria O. Earle

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In re:	Docket No. EPCRA-09-94-0015
CATALINA YACHTS, INC.,	COMPLAINANT'S RESPONSE TO RESPONDENT'S OPENING BRIEF
Respondent.	

COMES NOW THE COMPLAINANT in the above-entitled matter, the United States Environmental Protection Agency, Region 9 ("EPA") by its counsel of record, David M. Jones, in response to the Respondent's Opening Brief filed in the above-entitled matter.

I. Statement of the Case

Complainant adopts the statement of the case as set forth in the Introduction to the Post Hearing Brief dated April 14, 1997, filed by Complainant in the above-entitled matter beginning on page 1 and ending on the top of page 4 thereof.

In the Preliminary Statement, Part I of Respondent's Opening Brief, Respondent proclaims that "[l]iability is admitted."[1] The word "liability" is generally understood to mean "responsible" or "answerable."[2] The statement is apparently a reaffirmation of the Order Granting Motion for Accelerated Decision As To Liability dated January 10, 1995. Respondent's words must mean that Respondent is acknowledging responsibility for, or that Respondent is answerable for, the violations of Section 313 of EPCRA[3] [42 U.S.C. § 11023] as charged in each of

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[1] Respondent's Opening Brief, Part I. Preliminary Statement, p.1.

[2] Webster's II New Reverside University Dictionary,p.689.

[3] In the first sentence of the Preliminary Statement on page 1 of Respondent's Opening Brief, Respondent uses an acronymn, EPRCA. At the top of page 2 of the Opening Brief, Respondent cites *In re: Apex Microtechnology, Inc.*(1993), Docket No. EPCRA-09-92-0007, for the proposition that to the extent Section 325(b)(2) of EPCRA serves as the criteria for assessing a civil penalty under Section 304 of EPCRA, Section 325(b)(2) is applicable in the same manner for violations of Section 313 of EPCRA. See *Apex* pp.11 and 12.

At the hearing Respondent referred to Section 325(b)(1)(C) of EPCRA as providing the statutory criteria for penalty assessment. See Transcript at 12 to 16, and Respondent's Exhibit R-1. The discussion in *Apex* makes it clear that Section 325(b)(1)(C) is not the applicable criteria for assessing penalties prescribed by Section 325(c) as claimed by Respondent. See also *In re: Pease And Curren, Inc.*(1991), Docket No. EPCRA-I-90-1008,pp.10-12. The factors in 325(b)(1)(C) are the same as those in Section 16(a)(2)(B) of TSCA the difference lies in the rational for using

the seven counts in the Complaint and Notice of Opportunity for Hearing (hereinafter "Complaint").

At the end of the Preliminary Statement Respondent proclaims that "[u]nder the statutory criteria for the assessment of . . . penalties, no civil penalty is warranted," and "the imposition of a civil penalty would be unjust, and thus undermine the very law EPA Region IX seeks here to enforce and uphold."[4] Then, at the end of the Opening Brief, Respondent states "to penalize Catalina Yachts would not further compliance with the law. It would be unjust and would only promote the notion that our government is neither caring nor thoughtful."[5] However, Respondent provides no reason as to why the assessment of a civil penalty against Respondent would be unjust. That no bases for these statements

---

the TSCA factors. See *infra* p.29 & note 45.

Complainant disclaims any responsibility for determining the meaning of the acronym, EPRCA, used by Respondent in the Opening Brief. Further, Complainant disclaims responsibility for determing the applicability of Section 325(b)(1)(C) as the criteria for determing the civil penalty in the instant action. On the basis of the disclaimers set forth above, Complainant urges the Trier of Fact to strike all references in Respondent's Opening Brief to the acronymn EPRCA and to Section 325(b)(1)(C) wherever cited as the statutory criteria for penalty assessment.

[4] *Id.n.1.*

[5] *Id.n.1*,p.17.

is found in the Brief, compels the conclusion that the statements are made by Respondent solely for the purpose of arousing the sympathy of the Trier of Fact.

The statutory authority for the assessment of penalties for a violation of Section 313 of EPCRA is found at Section 325(c)(1) of EPCRA which reads in pertinent part:

> (1) Any person . . . who violates any requirement of section . . . 11023 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.

Complainant contends that the language in Section 325(c)(1) of EPCRA, a strict liability statute, is to be given a common sense interpretation and that the words enacted by the Congress mean just what they say.[6] Accordingly, if by their statement in the Opening Brief, "[l]iability is admitted," Respondent is admitting liability for failure to file Form Rs, as charged in the Complaint, then, Section 325(c)(1) above, makes appropriate

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[6] As the Supreme Court has stated, "the starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd. v Chesapeake Bay Foundation(1987)*, 484 U.S. 49 at 56, quoting *Consumer product Safety Comm's v GTE Sylvania, Inc.*(1980), 447 U.S. 102, 108. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *GTE Sylvania, Inc.*, 447 U.S. at 108. If the intent of the Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v Natural Resources Defense Council*(1984), 467 U.S. 837, 842-43.

the assessment of a civil penalty. Respondent's arguments in the Opening Brief set forth above, that no penalty should be assessed against Respondent for failure to file the Form Rs, is contrary to the obvious meaning of the words from Section 325(c)(1) above and for that reason alone should be rejected.

II. Respondent's Arguments Favoring No Penalty.

a. Respondent didn't know EPCRA existed.

At the end of the direct testimony of Respondent's sole witness at hearing, Gerald Bert Douglas, Vice President and chief of engineering at Catalina Yachts,[7] the witness was asked to "simply explain to the Court[Sic] why Catalina Yachts did not file Form Rs for the years in question with regard to its Woodland Hills' facility."[8] The response which followed was "[m]ainly because I didn't know about it."

b. Respondent complied with California and local requirements.

Mr. Douglas testified that prior to the inspection by EPA in November of 1993, he knew of only two agencies that required reports regarding chemicals on the Respondent's premises, the

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[7] Transcript at 79, lines 11 to 14.

[8] Transcript at 119, line 25; and Transcript 120 lines 1 to 7.

Hazardous Materials Division of the County of Los Angeles and South Coast Air Management District.[9] Examples of the reports submitted to these agencies were made a part of the record and designated Respondent's Exhibits 3, 4 and 5, respectively.

Mr. Douglas testified that it was his assumption that EPA charged South Coast Air Quality Management District with the enforcement of U.S. Environmental Protection Agency regulations. This was to suggest without saying that Mr. Douglas believed that when he complied with the South Coast Air Quality Management District's directives he was satisfying the mandate charged to the U. S. Environmental Protection Agency by the Congress of the United States, including EPCRA.[10]

In summary, Respondent believes that no penalty should be assessed against Respondent in this administrative action because their submission of reports to the Hazardous Materials Division of the County of Los Angeles and the South Coast Air Quality Management District, represented by Respondent's Exhibits R-3, 4 and 5, respectively, satisfied Respondent's obligation to submit the Form Rs as required by Section 313 of EPCRA.

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[9] Transcript at 82, lines 3 to 13.

[10] Transcript at 87, lines 7 to 11.

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c. Application of ERP/statute adjustment factors eliminates civil penalty.

Respondent has given consideration to a selection of factors taken from the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-To-Know Act (1986) and Section 6607 of the The Pollution Prevention Act (1990) (hereinafter ("ERP") and purportedly from EPCRA that result in the conclusion that no penalty should be assessed. With respect to the attitude factor from the ERP, Respondent would grant themselves a 30% reduction of the proposed civil penalty set forth in the Complaint of $175,000 even though it was stated throughout the hearing that the proposed civil penalty would be $162,500 after considering the adjustment for the delisting of acetone.

In their Opening Brief Respondent lumps together four factors identified as statutory guidelines,[11] nature, circumstances, extent and gravity of the violation and take another 30% reduction in the proposed civil penalty prior to

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[11] Opening Brief,p.14.

adjustment for the delisting of acetone.[12]

History of prior violations is a factor that is discussed in Section 16(a)(2)(B) of the Toxic Substances Control Act("TSCA"), as amended and the ERP. Respondent takes another write-down of 15% for the history of prior violations factor.[13] At this point Respondent has reduced the proposed penalty by 75%.[14]

d. Equity provides a credit which eliminates penalty assessment.

Through the testimony of their sole witness at hearing, Respondent presented extensive testimony regarding the various projects undertaken by Respondent purportedly in the interest of the environment. In their Opening Brief Respondent presents figures which purportedly represent the costs voluntarily incurred as environmentally beneficial expenditures both in the past and for the future.[15]

The only clue to the manner in which Respondent would apply

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[12] Opening Brief,p.15.

[13] Opening Brief,p.15.

[14] Attitude--Opening Brief, p.14 30%
Statutory Guidelines--Opening Brief, p.14 30%
Prior History of Violations--Opening Brief, p15 15%
75%

[15] Opening Brief,p.16.

the costs of their environmentally beneficial expenditures is found in the heading on page 16 of the Opening Brief as "Such Other Matters as Justice Requires," but, generally expressed as "such other matters as justice may require."

Undaunted by reality, Respondent would apply the justice factor to reduce the civil penalty to be assessed to zero. The credit to the proposed civil penalty of $175,000, that Respondent claims is in excess of $400,000, as shown in Part VI, the conclusion to their Opening Brief. Respondent has provided no detail in support of their justice claim.

III. Complainant's Arguments Favoring Penalty Assessment.

a. Everyone is deemed to know the law.

Respondent's argument that the penalty should be reduced because Respondent was not aware of EPCRA and that Respondent's violation of EPCRA was unintentional is without merit because Respondent is charged with knowledge of the law and should have been aware of the requirements of EPCRA.

It is well settled law that all persons are charged with knowledge of United States codes as well as regulations and rules promulgated thereunder and published in the Federal Register. 44 U.S.C. § 1507; *Federal Crop Ins. v. Merrill*, (1947), 332 U.S. 380, 384-385; *T.H. Agriculture and Nutrition Co.* (1984), TSCA

VII-83-T-191, p.11; *Colonial Processing, Inc.* (1991), Docket No. II EPCRA-89-0114, pp. 20-21; *Riverside Furniture*, p.5.

Further, the fact that Respondent was unaware of EPCRA does not provide a basis to reduce a penalty. Apex Microtechnology (1993), Docket No. EPCRA-09-92-00-07, p.18. EPCRA was enacted into law in 1986, almost seven years before the inspection which led to the filing of the Complaint.[16] Since that time EPA has conducted workshops as EPCRA outreach.

Based upon the outreach programs by EPA, Respondent should have known the reporting requirements of EPCRA. *Riverside Furniture*, p.7. (The success of outreach programs is predicated on what the respondent should have known as a result of outreach efforts.) "The failure of a corporation to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law." *Riverside Furniture, p.7,n.2.*

In addition, public policy requires that a penalty not be reduced on the basis of a respondent claiming to be ignorant of the law. Such reductions would encourage ignorance of the law and should be avoided. This is especially true with regard to Respondent whose place of business is located in a suburban Los

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[16] Exhibit A,p.3 ¶7, and Exhibit 2.

Angeles community.[17] Los Angeles County is a major metropolitan area providing immediate communications with the world on every level.

Since the enactment of EPCRA, EPA has conducted numerous EPCRA Workshops in the Los Angeles and Burbank areas. Either location is close to the Woodland Hills facility. Notices of the workshops were mailed out to companies like Respondent who had more than 100 employees by EPA every year beginning in 1987 and continuing at least through 1995. The database maintained by EPA shows that Respondent was on the mailing list for these mailings at least in 1987 and 1993.[18] Respondent apparently ignored the Workshop announcement on a consistent basis. Therefore, no penalty reduction should be made on the basis of Respondent's lack of knowledge of EPCRA.

b. Compliance with other environmental laws does not support a reduction in penalty.

Respondent has argued that the penalty should be reduced in this matter based on Respondent filing reports with local agencies on the use of resins containing styrene, the use of

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[17] Transcript at 79, lines 1 to 10.

[18] Exhibit A,p.9,¶17.

acetone and air emissions resulting from such use.[19] In support of these claims Respondent has submitted to Complainant and entered as an exhibit on the record of this proceeding a document marked as Exhibit R-3 which was submitted to the Los Angeles City Fire Department by a letter dated February 20, 1989, signed Brian Parker, Catalina Yachts.[20] In addition, two other documents submitted to South Coast Air Quality Management District covering Respondent's emissions data for the years 1988 and 1989 were entered on the record as Exhibit R-4 and R-5, respectively. According to Respondent the forms submitted to the Fire Department and the Air Quality Management District provided similar information as that required on Form Rs under EPCRA.

Section 313 of EPCRA requires the submission of data that is chemical specific. The information submitted on the Form Rs is not only chemical specific but, includes releases to air (fugitive and stack), water and land, and treatment on site and transfers off site.[21]

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[19] See Respondent's Exhibits R-3, 4 and 5.

[20] Transcript at 19, lines 24 and 25, Transcript at 20, lines 1 to 3, Transcript at 21, lines 20 to 25, Transcript at 22, lines 1 to 15.

[21] Transcript at 48, lines 12 to 25, at 49, lines 1 to 3.

The testimony of Complainant's witness, Dr. Pam Tsai, shows that with respect to Exhibit R-3, releases to air, water or land are not shown. In addition, R-3, unlike Form R, does not provide information as to waste management practices at Respondent's Woodland Hills facility or information with respect to off-site treatment, recycling or disposal of the chemicals.[22]

As for Exhibit R-4, the information reported in this exhibit is limited to releases to the air. In addition, the information given is limited to organic gases. The Exhibit R-4 form contains no information which will inform the public as to the releases of styrene.[23]

The information submitted by Respondent on Exhibit R-5 does not provide the same information as the Form R. The form contains information regarding styrene emissions, but is silent as to acetone emissions.[24]

The information submitted by Respondent in lieu of the Form Rs does not contain the comprehensive information that is to be reported under Section 313 of EPCRA. The information provided is

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[22] Transcript at 48, lines 12 to 25, at 49, lines 1 to 3.

[23] Transcript at 49, lines 23 to 25, at 50, lines 1 to 4.

[24] Transcript at 50, lines 5 to 17.

not compiled in a national database made available to the public. Compliance with other environmental laws such as the laws of the State of California or local agencies, does not relieve Respondent of its obligation to comply with EPCRA, nor does it provide a basis for reduction or mitigation of the penalty. *In re: Apex Microtechnology, Inc.* (1993), Docket No. EPCRA-09-92-00-07, pp. 5-6; *In re: Pacific Refining Co.* (1994), EPCRA Appeal No. 94-1, pp. 18-19 and n.19.

In *Apex*, respondent submitted reports to an air district providing information regarding annual usage of the same chemicals that it was required to report on under EPCRA. *Apex*, p.5. *Apex* argued, as Respondent here, that although it did not file its Form Rs, it did in fact disclose the equivalent information. *Apex*, p.6. The tribunal deciding that action rejected the argument and held that "there is no basis in the ERP to support a reduction or mitigation of the penalty because other reports were filed with local authorities." *Apex*, p.14. see also *Pacific Refining Co*, p.19 and n.19.

Further, Section 313 of EPCRA requires that Respondent provide the information to EPA and to the State of California, not just to local agencies. see e.g. *Pacific Refining Co.*,pp. 18-19. Congress recognized that EPCRA would collect information

that might have already been reported under other environmental laws, but passed EPCRA so that the information would be comprehensive and easy to access by the general public. In the debate on the bill that became EPCRA, Senator Lautenberg stated: "The information maybe scattered in air files, water files, and on RCRA manifest forms, for example, but not pulled together in one place to provide a complete usable picture of total environmental exposure." 131 Cong.Rec. S11776 (daily ed. Sept. 19, 1985) (statement of Sen. Lautenberg).

Thus, no reduction in the penalty should be made by the Trier of Fact based upon the fact that Respondent filed other reports with local agencies.

c. Application of the ERP/statutory adjustment factors do not preclude the assessment of a civil penalty.

1. Factors Related to the Violation.

The applicable statutory factors are found in Section 16 of the Toxic Substances Control Act (TSCA), as amended[25] [15 U.S.C.

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[25] With respect to civil penalties under EPCRA, Section 325(b)(2) of EPCRA [42 U.S.C. § 11045(b)(2)] provides in part:

> Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15.

§ 2615] which draws a distinct demarcation between factors relating to the violation itself and factors relating to the violator. For the violation itself, Section 16 of TSCA provides that in determining the amount of the civil penalty EPA must take into account the "nature, circumstances, extent and gravity of the violation or violations." [15 U.S.C. § 2615(a)(2)(B)]. The meaning of each of these terms will be explored in turn.

The commonly understood meaning of "nature" is the most appropriate interpretation. Webster's New World Dictionary defines nature as "[t]he essential character of a thing; quality or qualities that make something what it is; essence . . ." . As the U.S. Environmental Protection Agency noted in its 1980 TSCA penalty policy, "the nature (essential character) of a violation is best defined by the set of requirements violated." 45 Fed.Reg. 59770, 59771.

In this case, the nature of the EPCRA violations was the Respondent's failure to provide timely, complete and accurate information to EPA and the State of California as required by Section 313 of EPCRA [42 U.S.C. § 11023].[26] Except for 1992, Respondent filed each of the Form Rs required by the statute over

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[26] Transcript at 13, lines 8 to 25.

one year after the date that the same were due and after the November, 1993, inspection during which the Respondent's non-compliant status was uncovered.[27] The Form Rs for 1992 were filed eleven months after the date the same were due. Respondent's failure to provide the Form R information in a timely manner deprived the public of information on the use and releases of chemicals in the community and, consequently, deprives both individuals and government organizations of the opportunity to take steps to reduce the risks posed by these releases and thereby, could result in increased risk to the local community.

"Circumstances" is reasonably interpreted in the context of the TSCA penalty assessment factors as reflecting the probability of harm occurring as a result of the violation. See 45 Fed. Reg. 59770, 59772. Under Section 313 of EPCRA the circumstances of the violation "takes into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to the State of California and to the Federal government." ERP, p.8. The circumstances of the violations in this case is the failure to report in a timely

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[27] Exhibit A,p.7¶15.

manner.[28] This is the most significant of the violations of Section 313. Failure to report is classified as the most serious violation of Section 313 of EPCRA because such failure deprives the public of information on chemical releases which may have a significant affect on public health and the environment. In the case at bar toxic release information for the year 1988, Counts I and III, was not made available to the public for approximately five years.

The natural meaning of the term "extent" suggests a consideration of the degree, range or scope of a violation. In the context of Section 313 of EPCRA, EPA interprets this "extent" to take into consideration the quantity of a listed toxic chemical a facility processes, manufactures or otherwise uses. Facilities such as Respondent that process, manufacture or otherwise use ten or more times the reporting threshold for the Section 313 chemicals create a greater potential of exposure to the employees at the facility, the public and the environment. The amount of toxic chemicals processed, manufactured or otherwise used should be considered in assessing a penalty under EPCRA because the major goal and intent of EPCRA is to make

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[28] Transcript at 16, lines 1 to 9.

available to the general public, on an annual basis, a reasonable estimate of the toxic chemicals emitted into their local communities from regulated sources.[29] ERP, p.9.

Another factor in determining the extent of the violation is size of the respondent's business. The size of the respondent's business reflects the proposition that a smaller penalty will have the same deterrent effect on a small company, as a large penalty on a larger company. Respondent has more than 50 employees and at the time the Complaint was filed had annual sales of approximately $40 million.

The common sense meaning of "gravity" in the context of penalty assessment is the overall seriousness of a violation. In both TSCA and the ERP, EPA interprets "gravity" as a composite of other factors. For violations of Section 313 of EPCRA it is reasonable to view gravity as incorporating the considerations under the extent and circumstances elements of the violations.[30]

In their Opening Brief, Respondent's consideration of these factors is found on pages 14 amd 15. The nature, circumstances, extent and gravity of the violations are factors to be considered

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[29] Transcript at 30, lines 13 to 22.

[30] Transcript at 31, lines 12 to 17.

in determining the amount of civil penalty. These factors are irrelevant to and misapplied by Respondent to achieve penalty mitigation. Respondent's consideration of these factors does not distinguish factors pertaining to the violation from factors pertaining to the violator. In fact, Respondent's discussion under a heading listing these factors doesn't relate the factors to any element of the case. Nevertheless, Respondent concludes at the end of a discussion that the Presiding Administrative Law Judge can only determine to be irrelevant, that Respondent is entitled to a diminution in the civil penalty of thirty percent.

For the reasons stated above, Complainant contends that the factors related to the violation were considered and applied properly in determining the proposed civil penalty.

2. Statutory Adjustment Factors That Relate To The Violator.

Section 16 of TSCA also requires the consideration of factors pertaining to the violator. These factors include: "Ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." [15 U.S.C. § 2615(a)(2)(B)]

Ability to pay generally encompasses a review of a

violator's solvency and an assessment of the effect a given penalty will have on the firm's ability to continue in business. However, in an order by the Presiding Administrative Law Judge[31] rescinding an order whereby Complainant sought financial information to determine Respondent's ability to pay, Respondent stated that it was not raising ability to pay as a defense to the proposed penalty.[32] The order then stated ". . . the only reasonable interpretation of Catalina's assertion is that it is a waiver of 'ability to pay/inability to pay' as a defense to the penalty sought by Complainant . . ." .[33] No evidence has been presented to date by Respondent regarding Respondent's ability to pay the proposed civil penalty or that payment of the proposed civil penalty would in any way impair Respondent's ability to continue in the boat building business.

While Respondent does not have any history of prior violations of EPCRA, on page 15 of the Opening Brief, Respondent seeks a reduction in the proposed civil penalty of fifteen percent. Downward adjustments under this factor are not

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[31] Order Rescinding Discovery Order dated April 1, 1996.

[32] *Id.*p.4.

[33] *Id.*

permitted. See, *In re: Spang & Company*(1995), EPCRA Appeal Nos. 94-3 & 94-4,p.27,n28; See also, Pacific Refining Company (1994), EPCRA Appeal No. 94-1,p.11; In re: Apex Microtechnology, Inc (1993), Docket No. EPCRA-09-92-0007,p.16; In re: K-I Chemical U.S.A., Inc.(1995), Docket No. TSCA-09-92-0018,p.24.

EPCRA has been determined to be a strict liability statute; thus, culpability is considered only when there is evidence that Respondent knowingly violated EPCRA. *Riverside Furniture*, Interlocutory Order Granting Complainant's Motion For Partial Accelerated Decision, p.5,n.2. (Intent is not an element of an EPCRA civil violations); see also ERP, p.14 ("Lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA . . . ."). There is no evidence that Respondent's violations were knowing or willful. Although EPA considered the statutory factors of Respondent's ability to pay, effect on ability to continue to do business and culpability, in the case at bar, no adjustment was made by Complainant in the proposed civil penalty based upon these factors because they were determined by EPA to be inapplicable to Respondent. It is inappropriate to apply a downward penalty adjustment for culpability.

On page 15 of their Opening Brief, Respondent has comments

under the heading Economic Benefit Resulting From the Violation. Economic Benefit to Respondent is not a statutory factor. However, continuing the comment made by Respondent regarding David B. Wright, who was hired by Respondent to prepare the late Form Rs, who had a good working rapport with Respondent's witness, who was employed by the consulting firm named Encom as shown by the letter of transmittal accompanying Respondent's Exhibit R-5, but was never called upon to advise Respondent's witness, an officer of the Respondent corporation, on Respondent's obligations under EPCRA and other Federal environmental laws.[34]

The final factor in the category of statutory factors to be considered is "other matters as justice may require." On page 16 of the Opening Brief, Respondent's brief comments covering this factor are found under a heading which reads "Such Other Matters as Justice Requires."

It is the general practice at EPA to apply this factor during settlement negotiations.[35] To assure national consistency the ERP has provided guidance in assessing issues which may

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[34] Transcript at 98, lines 15 to 25.

[35] Transcript at 34, lines 14 to 20, and Transcript at 37, lines 5 to 18.

qualify as "other factors as justice may require." The ERP factors include: new ownership for history of prior violations, borderline violations and lack of control over the violation. In the case at bar Respondent's violations are not due to a new ownership for history of prior violations. Nor are the violations borderline since Respondent used acetone and styrene at quantities well over ten times the reporting quantity threshold[36] and had over 200 employees at the time of the inspection,[37] versus 10 employees for the number of employees reporting threshold.[38] Nothing on the record in this action shows that Respondent had less than total control over the violations. The ERP warns that "[u]se of this reduction is

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[36] The following is a summary of usage and threshold taken from the Complaint:

		Acetone Used	Styrene Processed
1988	approx.	308,106 pounds	1,784,078 pounds*
1989	approx.	101,655 pounds	2,691,348 pounds**
1990	approx.		898,416 pounds**
1991	approx.		624,441 pounds**
1992	approx.		660,798 pounds**
	Threshold	10,000 pounds	*50,000 pounds **25,000 pounds

[37] Transcript at 81, line 7.

[38] Section 313(a) [42 U.S.C. § 11023(a)].

expected to be rare and the circumstances justifying its use must be thoroughly documented in the case file."[39]

At hearing Respondent presented extensive evidence of projects undertaken by Respondent which were represented as environmentally beneficial expenditures. The relationship of these projects to the violations charged against Respondent in the Complaint was not made clear at the hearing. Complainant was left to surmise the application of Respondent's testimonial evidence.

Complainant contends that the evidence of past projects by Respondent presented at hearing fails to meet the evidentiary requirements discussed in *In re: Spang & Company* and for that reason may not be considered under the justice factor in determing the amount of the civil penalty to be assessed.[40]

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[39] ERP,p.18.

[40] "Whether a project warrants a penalty adjustment, and if so, how much, will of course depend upon the evidence in the record. If a respondent claims that justice requires consideration of steps taken and monies spent on a project, a respondent needs to produce evidence of those steps and expenditures. The snapshot provided by the evidence in the record will provide the factual basis that will enable the presiding officer to determine whether justice warrants a penalty reduction for those steps and expenditures, and if so, how much. Absent such evidence, there is no factual basis for concluding that the calculated penalty will produce an injustice." *Spang & Company*, p.61.

Respondent has compounded the evidentiary failure in their Opening Brief by presenting proposed adjustments as percentages and dollars without explanation as to how the percentages or dollars were determined. For example: On page 16 of the Opening Brief Respondent has set forth dollar amounts which are to be used in adjusting the civil penalty. No creditable evidence was given as to how Respondent arrived at these amounts.

For the reasons stated above, Complainant contends that all the statutory adjustment factors related to the violator were properly considered and applied in determining the proposed civil penalty and no penalty adjustment should be granted to Respondent.

3. EPA Also Considered The Adjustment Factors In The ERP.

In addition to the statutory factors, in assessing a penalty EPA also considers it appropriate to weigh several additional adjustment factors under the ERP. These are: voluntary disclosure, delisted chemicals, attitude and supplemental environmental projects. ERP, p.8.

The first adjustment factor, voluntary disclosure is not applicable to the case at bar because the violations were

discovered as a result of an inspection.[41] ERP, p.14.

The adjustment factor for delisted chemicals is applicable in this case. Acetone was delisted effective June 16, 1995, and the fixed reduction percentage in the proposed civil penalty taken from page 17 of the ERP, 25% is applicable[42] even though Respondent has used the proposed civil penalty shown in the Complaint in their Opening Brief. Complainant urges the Trier of Fact to determine that the proposed civil penalty in this action is $162,500 after adjustment for the delisting of acetone.

The supplemental environmental project ("SEP") adjustment is limited in its application by Complainant to settlement discussions.[43] An SEP was never accomplished by the parties because an SEP was never presented to Complainant by Respondent for consideration and evaluation.

In their consideration of the adjustment for attitude beginning on page 13 of the Respondent's Opening Brief, Respondent would credit themselves with 30% of $175,000 or

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[41] Transcript at 58, lines 3 to 11.

[42] Transcript at 54, lines 2 to 10, and Transcript at 73, lines 1 to 6.

[43] Transcript at 37, line 25, and Transcript at 38, lines 1 to 25, and Transcript at 54, lines 11 to 20.

$52,500. The attitude adjustment factor with its two components, cooperation and compliance, was not applied in calculating the proposed civil penalty set forth in the Complaint because of Complainant's practice of considering application of the factor during the course of settlement discussions. Complainant believes that the speed and completeness with which Respondent comes into compliance as well as the degree of cooperation and preparedness, including but not limited to, allowing access to records, responsiveness and expeditious provision of supporting documentation requested by Complainant is best measured through the settlement process.

Respondent's generosity in awarding itself a $52,500 credit as an adjustment under the attitude factor overlooks Respondent's tardiness in supplying the EPCRA Inspector information regarding Respondent's useage and release of chemicals. The inspection at the Woodland Hills facility took place in November, 1993, however, the information requested by the inspector was not supplied by Mr. Wright, the person hired by Mr. Douglas to complete the Form Rs the day of the inspection[44], until May,

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[44] Transcript at 91, lines 3 to 21.

1994.[45] Mr. Douglas testified at the hearing that it would not have cost more than $200 to have Mr. Wright prepare the Form Rs.[46] Nevertheless, it took Respondent almost six months to submit the requested Form Rs. On the basis of Respondent's conduct in connection with the inspection and achieving compliance with EPCRA, Complainant urges the Trier of Fact to deny Respondent any credit under the attitude factor.

For the reasons stated above, Complainant contends that the adjustment factors in the ERP were considered and applied properly in determining the proposed civil penalty.

d. EPA Has Met The Burden That The Proposed Penalty Is Appropriate.

Section 22.24 of the Rules of Practice, 40 C.F.R. Part 22, places the burden of proof regarding the "appropriatness" of the penalty on Complainant. Judge Reich writing for the Environmental Appeals Board in *In re: Employers Insurance of Wausau and Group Eight Technology, Inc.* said:

> The complainant's burden under TSCA § 16 and 40 C.F.R. § 22.24 is only to demonstrate that it 'took into account' certain criteria specified in the statute, and that its proposed penalty is 'appropriate' in light of those criteria and the facts of the particular violations at issue. To

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[45] Exhibit 2 to Exhibit A.

[46] Transcript at 99, lines 3 to 5.

> satisfy the complainant's initial burden of going forward, it should ordinarily suffice for the complainant to prove the facts constituting the violations, to establish that each factor enumerated in TSCA § 16[47] was actually considered in formulating the proposed penalty, and to explain and document with sufficient evidence or argument how the penalty proposal follows from an application of the section 16 criteria to those particular violations.

In re: Employers Insurance of Wausau And Group Eight Technology, Inc.(1997), TSCA Appeal No. 95-6, p.33.

Complainant's initial burden, to prove the facts constituting the violations was met upon the issuance of the Order Granting Motion for Accelerated Decision dated January 10, 1995, signed by the Presiding Administrative Law Judge. The argument set forth in this Part III of Complainant's Response to Opening Brief clearly establishes that each factor enumerated in TSCA § 16(a)(2)(B) was actually considered in formulating the penalty proposed in the Complaint and how the proposed civil penalty as adjusted for the delisting of acetone follows from an application of the criteria set forth in Section 16(a)(2)(B) of TSCA to the violations charged in the Complaint. There is adequate evidence on the record of this proceeding to show that Complainant has satisfied

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[47] The penalty criteria set forth in Section 16(a)(2)(B) of TSCA applied in *Employers* is applicable to the instant action by virtue of Section 325(b)(2) of EPCRA which provides for Class II administrative penalties, and requires that civil penalties be assessed in the same manner and subject to the same provisions, as civil penalties are assessed under Section 2615 of Title 15.

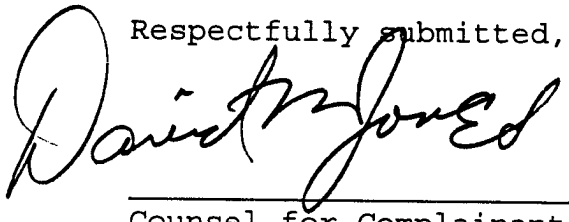
and sustained the initial burden of going forward imposed under Section 22.24 of the Consolidated Rules of Practice.

IV. Conclusion.

Based on the foregoing, it is respectfully requested that an Initial Decision issue in favor of Complainant and that a penalty of ONE HUNDRED SIXTY-TWO THOUSAND FIVE HUNDRED DOLLARS be assessed against the Respondent.

Dated: May 14, 1997.

Respectfully submitted,



Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing Complainant's Response To Respondent's Opening Brief was filed with the Regional Hearing Clerk, Region 9 and that a copy was sent by First Class Mail to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, Room 3706 (1900)
Washington, D. C. 20460

and to:

Robert D. Wyatt, Esquire
Eileen M. Nottoli, Esquire
BEVERIDGE & DIAMOND
One Sansome Street, Suite 3400
San Francisco, California 94105

5/14/97
Date

Office of Regional Counsel
U. S. Environmental Protection
Agency, Region 9